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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 107.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

CAROLINE W. DOBBINS, PLAINTIFF IN ERROR,

vs.

THE CITY OF LOS ANGELES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

LYNN HELM,
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CHARLES W. CHASE,
Attorneys for Plaintiff in Error.

(19,051.)

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

CAROLINE W. DOBBINS,
Plaintiff in Error.
vs.
CITY OF LOS ANGELES,
Defendant in Error.

MARTIN DALY,
Plaintiff in Error.
vs.
CHARLES ELTON, Chief of Police of the City of Los Angeles.
Defendant in Error.

No. 19051—19052.

In Error to the Supreme Court of the State of California.

BRIEF OF PLAINTIFF IN ERROR.

NOTE—As these writs of error have been consolidated and submitted together to this Court for argument, a similar brief has been filed in each case. For convenience, the first of said cases will be referred to in this brief as the "Dobbins" case, and the other as the "Daly" case.

MAY IT PLEASE YOUR HONORS:

There are two general questions to be decided in these cases, viz:

First, whether the ordinance of the City of Los Angeles, adopted on the 26th day of August, 1901, and the amended ordinance of March 3rd, 1902, are valid and binding upon the plaintiff in error, Caroline W. Dobbins, as against her right to conduct a lawful business of erecting gas works and manufacturing gas, or as against the vested rights which she had acquired in reference thereto by virtue of legislative authority, and as against the rights of the plaintiff in error, Martin Daly, as the employee of said Caroline W. Dobbins, engaged in erecting the said gas works for the said plaintiff in error, Caroline W. Dobbins, as being unreasonable and oppressive and in violation of constitutional rights; and

Second, whether a court of equity has jurisdiction to restrain by injunction a municipality from instituting criminal proceedings, when such prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

These questions presented by the writs of error herein were attempted to be presented to this Court in the case of *Davis & Farnum Manufacturing Company v. The City of Los Angeles,* 189 U. S., 207; but this Court held, in that case, that as Mrs. Dobbins, the owner of the land and the proposed gas works, was not the plaintiff in that case, nor the Valley Gas & Fuel Company, with which she had made a contract to erect the works, but a sub-contractor, which had made a contract with the Valley Gas & Fuel Company to erect for them and upon the premises to be designated by Mrs. Dobbins, a tank and gas holder, that the plaintiff could not show that it suffered an irreparable loss by the interference of the City, and that the appellant therein had

shown no legal interest in the litigation and no lack of a complete and adequate remedy at law, and therefore that the bill in that case was properly dismissed by the Circuit Court.

The questions now presented to this Court by the writs of error in these cases are presented directly by Caroline W. Dobbins, the owner of the land and the proposed gas works, in a suit to enjoin the enforcement of an unconstitutional ordinance, and by Martin Daly, one of the employes at work upon such gas works, arrested for a violation of the alleged ordinance adopted by the City of Los Angeles, the same ordinance that was sought to be questioned in the case of *Davis & Farnum Manufacturing Company vs. the City of Los Angeles, supra.*

We shall discuss these questions in the order of their statement, for the reason that the question as to the validity of the ordinance above referred to, adopted by the City of Los Angeles, and hereinafter set forth in full, is the question presented directly in both of these cases; in the case of Caroline W. Dobbins, plaintiff in error, by the action brought to enjoin the City of Los Angeles, the defendant in error, from enforcing the ordinance, on the ground that such ordinances are invalid and are being enforced for the purpose of compelling the relinquishment of the property rights of the said plaintiff in error; in the case of Martin Daly, petitioner, upon his petition for a writ of habeas corpus, to be discharged from arrest for the alleged violation of said ordinances.

We shall discuss these questions in the order of their statement for the further reason that if the ordinances are invalid and interfere with the right of the plaintiff in error Mrs. Dobbins, to conduct a lawful business, or with her vested rights which she has acquired by virtue of legislative authority, it will follow that a court of equity has juris-

diction to restrain by injunction the defendant municipality from instituting and prosecuting the criminal proceedings threatened or instituted under color of such invalid ordinances for the purpose of compelling the relinquishment of the property rights of the said plaintiff in error. A crime or offense for which an offender can be prosecuted is not created by an invalid law or ordinance. Every arrest under such an ordinance is a lawless and forcible trespass, and a court of equity will restrain a trespasser from coercing submission to lawless demands by prosecutions for alleged crimes before courts which have no jurisdiction to try the accusation.

STATEMENT OF THE CASE.

The complaint filed in the Dobbins case March 10, 1902, alleges, that on the 26th day of August, 1901, the City Council of the City of Los Angeles passed an ordinance known as Ordinance No. 6663, of which the ordinance of March 3rd, 1902, is an amendment. The ordinance of August 26th, 1901, numbered 6663, is as follows:

> An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles.
>
> The Mayor and Council of the City of Los Angeles do ordain as follows:
>
> Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street, to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. Any person, firm or corporation who shall violate any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) or by imprisonment in the City Jail for not less than Thirty (30)

days nor more than One Hundred (100) days, or by both such fine and imprisonment. Every day that such gas works, tank or reservoir is maintained in violation of the provisions of this Ordinance, shall be deemed a seperate offense within the meaning of this Ordinance.

Section 3. Ordinance No. 174, approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 4. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

Specifically the ordinance provides that it is unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the district described in the ordinance. That district as originally laid out, included the district bounded on the north by San Fernando street, on the east by the Los Angeles river, making an apex at the junction of San Fernando street and the Los Angeles river, and on the south by the boundary of the city limits. The western boundary was an irregular line, and as we claim, was laid out and described for the purpose of protecting the existing works of the Los Angeles Lighting Company, and was bounded and designated without regard to any geographical or natural lines, but simply described for the purpose of running around and including the present gas works of the Los Angeles Lighting Company in the City of Los Angeles. The violation of this ordinance was made a misdemeanor, punishable by fine or imprisonment, or both, and

every day that such gas works, tank or reservoir should be maintained in violation of the purpose of said ordinance, should be deemed a separate offense within the meaning thereof.

On or about the first day of August, 1901, the plaintiff in error, Caroline W. Dobbins, contemplating the erection of gas works for the purpose of the manufacture, recovery, storage and distribution of gas, for the purpose of supplying the inhabitants of the City of Los Angeles and the inhabitants of cities neighboring and adjacent thereto, caused to be organized a corporation known as the Valley Gas & Fuel Company, which said company was, on the 9th day of August, 1901, duly organized under and by virtue of the laws of the State of California. After the passage of the ordinance of August 20th, 1901, about the first day of September, 1901, the plaintiff in error, Caroline W. Dobbins, made and entered into a contract with the Valley Gas and Fuel Company to build, construct and erect for her on certain premises to be designated by her, certain gas works, including coke ovens and all things necessary for the manufacture, recovery, storage and distribution of gas, said works in themselves consisting of gas generators, gas washers and scrubbers, purifiers and gas holder, and tank, the same to be all completed and to be delivered to said plaintiff in error on or before the first day of January, 1902.

To carry out its undertaking, subsequently the Valley Gas and Fuel Company entered into divers and sundry contracts with divers and sundry persons to do the work necessary for the erection of said coke ovens and gas works.

On the 20th day of September, 1901, the said plaintiff in error, Caroline W. Dobbins, for the purpose of erecting gas works for the manufacture, recovery, storage and distribution of gas for the purpose of supplying the inhabi-

tants of the City of Los Angeles with gas, purchased within the district within the City of Los Angeles within which it was lawful under the ordinance of August 26th, 1901, above set forth, to erect gas works, a tract of land consisting of three lots and a half, and known as lots sixteen, seventeen, eighteen and part of lot fifteen of block two of Pomeroy & Mills' subdivison of the Hollenbeck Tract, described in the bill of complaint filed herein.

On the first day of November following, Mrs. Dobbins applied to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect and maintain gas works on said premises under what is known as the "Building Ordinance of the City of Los Angeles," which required that the person desiring to erect gas works within the City of Los Angeles should first secure from the Board of Fire Commissioners a permit so to do. This ordinance gave the Fire Commissioners, upon a hearing of all parties interested, authority to grant or refuse such permit.

Upon the application of Mrs. Dobbins to the Board of Fire Commissioners for such a permit, notices were properly given of the hearing in accordance with the ordinance to all persons interested, and on the 8th day of November, 1901, a hearing was had before the Fire Commissioners. The Board of Fire Commissioners gave an opportunity to all persons interested to be heard, and having taken the matter under advisement, afterwards, on the 22nd day of November, 1901, the application of the said plaintiff in error, Caroline W. Dobbins, for permission to erect and maintain a gas works was granted.

Mrs. Dobbins, the plaintiff in error, having fully complied with all the ordinances then in force in the City of Los Angeles in reference to the erection of gas works, both as to the place of their erection and as to the securing of a permit from the proper authorities therefor, commenced

the construction of the gas works upon the premises which she had purchased in the district in which it was lawful to erect gas works under the ordinance of August 26th, 1901, and by virtue of the permit granted by the Board of Fire Commissioners. Contracts were immediately let with certain persons, and especially for the laying of foundations for the water tank, scrubbers and generators. Such foundations were laid at once at a cost of upwards of twenty-five hundred dollars, and as the complaint shows, were of great strength and costly materials, and if the same should have to be destroyed or removed would cause irreparable damage or injury to the plaintiff in error, Mrs. Dobbins, and to her contractors.

After the material had all been placed upon the ground for the erection of these foundations, and the foundations were nearly completed, on the 25th day of November, 1901, the City Council of the City of Los Angeles attempted to pass a purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the said City of Los Angeles,' approved August 26th, 1901, by amending Section one of said ordinance.'" Said purported ordinance is in words and figures as follows:

ORDINANCE NO. 6779.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1, of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the City of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence

northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

By this ordinance an attempt was made to cut out and eliminate from the territory described in the ordinance of August 26th, 1901, the land that had been purchased by Mrs. Dobbins, and being the premises on which she was then erecting the gas works under her permit from the Board of Fire Commisioners.

Nothing was done, however, in reference to the enforcement of this alleged ordinance of November 25th, 1902, until abopt the 27th day of February, 1902. In the meantime, the plaintiff in error, Caroline W. Dobbins, through the said corporation, the Valley Gas & Fuel Company, under the contract of the said plaintiff in error, with said company for the erection of said gas works, was peaceably and lawfully engaged in the erection of the gas works upon the premises above described, and the Valley Gas & Fuel Company had for the said plaintiff in error erected upon the said premises complete the gas generator, and also the scrubbers and washers used in the manufacture of gas; the generators and scrubbers were all complete, except a connection therewith by a pipe necesssary therefor of about six feet in length and about twelve inches in diameter; the water tank and gas holder was commenced upon the foundations prepared

therefor by the Valley Gas & Fuel Company, and was in process of construction without interruption, by Davis & Farnum Manufacturing Company, a corporation of the State of Massachusetts, in the business of manufacturing gas holders and gas tanks, under a contract with the Valley Gas & Fuel Company for the said plaintiff in error, The water tank was to be 62 feet in diameter by 20 feet 9 inches in height, and was to have a capacity of 467,700 gallons of water, and was to be made of sheet steel and iron and to have steel bottoms, thoroughly riveted and made water tight, having a textile strength of 62,000 pounds to the square foot. Inside of the said water tank was to be erected a steel gas holder with a capacity of 100,000 cubic feet of gas, consisting of two lifts wtih proper curbs and cups, each lift being made of steel and to be constructed in a good workmanlike manner, at a cost of $13,685. All the iron and steel used in the construction of the tank and gas holder were upon the ground at the time of the filing of the complaint herein in the Superior Court of Los Angeles County, and ready to be put in place, and the tank was already erected to a height of 15 feet 9 inches, and if the contractors engaged in erecting said work had been allowed to complete said tank they would in the course of a week or ten days have had the same fully completed and within six weeks have had the gas holder completed and put in place ready to be delivered to the said plaintiff in error. It is averred that if the work of erecting said works could be continued peaceably and without interference from the said defendant in error, the City of Los Angeles, that the same would be completed and ready for operation within the period of about six weeks from the date of the filing of the said complaint.

While the plaintiff in error, Caroline W. Dobbins, and her contractors and sub-contractors were lawfully and

peaceably engaged in the erection of said gas works and said gas holder, up to and including the 25th day of February, 1902, on the 25th day of February, 1902, the said defendant in error, the City of Los Angeles, combining and confederating with one James R. C. Burton, and with divers and sundry persons to the plaintiff in error unknown, in the name of the people of the State of California, instituted a proceeding in the police court of the City of Los Angeles against F. A. Smith and Thaddeus Lowe, then in the employ of the Valley Gas & Fuel Company, in the erection of said works on the premises of the said plaintiff in error, Caroline W. Dobbins, as hereinbefore described, charging the said F. A. Smith and the said Thaddeus Lowe with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected certain works, establishments and manufactories for the manufacture of gas, and a certain reservoir and receptacle for the storage of gas within the corporate limits of the City of Los Angeles, attempted to be described in the purported ordinance attempted to be passed by the said Council of the City of Los Angeles on the 25th day of November, 1901, and last hereinbefore set forth; and thereupon, upon the complaint filed in the said proceeding filed in the said police court of the City of Los Angeles on the 25th day of February, 1902, caused the arrest and detention of said Thaddeus Lowe and said F. A. Smith, upon a warrant issued by the Judge of said police court of the City of Los Angeles for the alleged violation of the said city ordinance.

On the first day of March, 1902, the City of Los Angeles again combining and confederating with the said James R. C. Burton, and with divers and sundry persons to the said plaintiff in error unknown, in the name of the people of the State of California, instituted another pro-

ceeding in the police court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and four other persons then and there engaged upon said premises in the employ of the said Valley Gas & Fuel Company, or of other persons engaged in the erection of said gas works on the premises of the plaintiff in error, Caroline W. Dobbins, hereinbefore described, charging them, as in the last complaint described; and on the first day of March, 1902, caused the arrest and detention of the said F. A. Smith, Thaddeus Lowe and the four other persons above mentioned upon a warrant issued by the Judge of said Police Court of the City of Los Angeles for the violation of said ordinance.

Afterwards, on the first day of March, 1901, the said defendant, the City of Los Angeles, again combining and confederating with the said James R. C. Burton, and with divers and sundry other persons to the plaintiff in error unknown, in the name of the people of the State of California, instituted another proceeding in the Police Court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and fourteen other persons engaged in the erection of said gas works for the said plaintiff in error, Caroline W. Dobbins, or her contractors on the premises of the said plaintiff in error hereinbefore described in carrying out the contracts entered into between the said plaintiff in error and the said Valley Gas & Fuel Company for the erection of the gas works aforesaid, charging the said persons in said complaint named with having committed a misdemeanor, as in said first complaint alleged; and thereupon, on the 1st day of March, 1902, caused the arrest and detention of the said defendants in said complaint mentioned, sixteen persons in all, upon a warrant issued by the Judge of said Police Court of the City of Los An-

geles for the alleged violation of the said alleged city ordinance last hereinbefore set forth.

The arrest and detention of the said employes of the said plaintiff in error, Caroline W. Dobbins, and her subcontractors seriously interfered with and interrupted the work of the said plaintiff in error and all her contractors in erecting said gas works and was in violation of the rights of the said plaintiff in error as acquired under and by virtue of her contract with the Valley Gas & Fuel Company, and also in violation of the rights granted to the said plaintiff in error by the City of Los Angeles on the 22d day of November, 1901.

On the 3rd day of March, 1902, the City of Los Angeles, recognizing the invalidity of the alleged ordinance attempted to be passed and adopted by the City Council of the City of Los Angeles November 25th, 1901, as hereinbefore set forth, attempted by its Mayor and Council to pass another purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs, within certain portions of the City of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," which said purported ordinance is in words and figures as follows:

ORDINANCE NO. 7029.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1 of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along the south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue, and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence

westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

Plaintiff in error, Caroline W. Dobbins, was endeavoring in all respects, as she lawfully might, to erect and have erected upon the premises hereinbefore described the said gas works, but while the men in the employ of the said plaintiff in error and her said sub-contractors engaged upon the contracts above described were engaged in the erection of said gas works, the City of Los Angeles on the 6th day of March, 1902, again combining and confederating with the said James R. C. Burton and with divers and sundry other persons to the said plaintiffs in error unknown, in the name of the people of the State of California, instituted another proceeding in the Police Court of the City of Los Angeles against the said Thaddeus Lowe, F. A. Smith, the said plaintiff in error, Martin Daly and twenty-one other persons, employes engaged in the erection of said gas works upon the premises aforesaid, charging said F. A. Smith,

the said Thaddeus Lowe and the said plaintiff in error, Martin Daly, and the said twenty-one other persons with having committed a misdemeanor, in that they did wilfully and unlawfully erect or cause to be erected, maintain or cause to be maintained, certain works, establishments and manufactory for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the said City of Los Angeles, and outside of the limits of the said alleged district described in said purported ordinance attempted to be passed by the City Council of the City of Los Angeles on the 3rd day of March, 1902, as hereinbefore set forth; and thereupon, upon the complaint filed in said proceeding in said Police Court of the City of Los Angeles, on the 6th day of March, 1902, caused the arrest of the said Thaddeus Lowe, F. A. Smith, the said plaintiff in error, Martin Daly, and the twenty-one other persons above referred to, upon a warrant issued by the Judge of said Police Court of the City of Los Angeles for the alleged violation of the said alleged ordinance.

The complaint filed by Caroline W. Dobbins alleges that the said City of Los Angeles, continuing to combine and confederate with the said James R. C. Burton and with divers and sundry persons to said plaintiff in error unknown, threatens in the name of the people of the State of California, to institute other proceedings in the Police Court of the City of Los Angeles against the employes of the said plaintiff in error under said contractors engaged in the erection of said gas works on the premises of the said plaintiff in error, and threatens to charge them and each of them with having committed other misdemeanors, charging them and each of them with wilfully and unlawfully erecting or causing to be erected, maintaining or causing to be maintained, works, establishments or manufactories for the manufacture of gas, or tanks, reservoirs or receptacles for the

storage of gas within the corporate limits of the City of Los Angeles, and outside of the limits described in said purported ordinance, attempted to be passed by the City Council of the City of Los Angeles on the 3rd day of March, 1902, as hereinbefore set forth; and that said City of Los Angeles threatens to cause the arrest and detention of said employes engaged in the erection of said gas works and to imprison and confine them for alleged violation of the said alleged city ordinance; and the said City of Los Angeles threatens that if the said plaintiff in error, Caroline W. Dobbins, continues to carry on her said work in which she is engaged in completing the said gas works and manufactory for the manufacture of gas, that it will arrest all persons employed and engaged in said work until it will have stopped the construction of said gas works and compelled the said plaintiff in error to desist from the erection thereof.

Plaintiff in error, Caroline O. Dobbins, averred that unless the defendant, the City of Los Angeles be restrained and enjoined by said Superior Court from executing its said threats, that the said City of Los Angeles will arrest and continue to arrest the men employed in the erection of said gas works on the premises of the said plaintiff in error until said work is stopped, and the said plaintiff in error is unable to complete the said undertakings entered into by her in the erection of said gas works as aforesaid.

In her complaint, plaintiff in error, Caroline W. Dobbins, alleges that ever since the inception of the said enterprise so instituted, commenced and undertaken by the said plaintiff in error, the said defendant, the City of Los Angeles, and the municipal authorities thereof, its officers and agents, have continuously thrown obstacles in the way of the successful completion of the said enterprise of the said

plaintiff in error and have continuously and systematically attempted to thwart and frustrate the plans of the said plaintiff in error, and have interfered with and interrupted her said work in various portions thereof; that immediately after the organization, at the instance of and for the benefit of the said plaintiff in error, Caroline W. Hebbins, of the said Valley Gas & Fuel Company, the said City Council of the City of Los Angeles attempted to pass and adopt the Ordinance number 6663, New Series, which was adopted on the 26th day of August, 1901, as aforesaid, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles;" and afterwards, when the said plaintiff in error had purchased, within the district prescribed by the said ordinance last hereinbefore referred to, the land upon which she proposed to erect the said gas works, and when, on or about the 29th day of September, 1901, an application had been made to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect gas works upon said premises, the said City Council considered and deliberated upon an ordinance then and there introduced in said City Council of the City of Los Angeles, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending Section 1 of said ordinance," the object of said ordinance being to further restrict the limits of the district in the City of Los Angeles in which it was lawful to erect and maintain gas works, by which said ordinance it was proposed to eliminate from the district theretofore described in the alleged ordinance adopted on the 26th of August, 1901, all that portion of said district lying between San Fernando street on the north

of the said ordinance; and thereupon, at the next meeting of the said Board of Fire Commissioners of the City of Los Angeles the said rule and regulation hereinafter referred to, having theretofore been considered by the said Board of Fire Commissioners as aforesaid, was, at the meeting of the Board of Fire Commissioners on or about the 25th day of October, 1901, adopted, in words and figures as follows:

"Whereas, applications are on file with this Board for permission to erect gas manufacturing plants at different points within the district to which said plants are limited; and, whereas, a very great majority of the property owners living in the vicinity of locations for which applications are made protest against the granting of permits; and, whereas, this Board is satisfied that the respective applicants for permission to build are attempting to engage in the business of the distribution of gas for general purposes, including its use for fuel and power, without first procuring a franchise from the city for said right; now, therefore, be it resolved, that all applications now pending before this Board for permission to erect gas manufacturing plants are hereby denied; that, hereafter, in all cases where an application for permission to erect a gas manufacturing plant shall be made to this commission, the said application shall state whether or not the gas so manufactured is to be supplied to the inhabitants of the City of Los Angeles for illuminating purposes only. Said application shall be verified by the oath of the applicant, and in case it shall appear to the commission that no proper ground exists for the denial of the application, and that said gas is to be used for illuminating purposes only, the same shall be forthwith granted. But in case it shall appear that the gas is to be furnished for general purposes, such as fuel, power, etc., then the applicant therefor must procure a franchise from the City of Los Angeles to distribute gas before his said application will be finally granted by this commission."

The effect of which rule was to dismiss and deny the application theretofore made for permission to erect gas works

upon the premises of the said plaintiff in error as hereinbefore set forth; that afterwards, on the 1st day of November, 1901, the said plaintiff in error, Caroline W. Dobbins, having complied with all the rules and regulations of the said Board of Fire Commissioners, made an application on her own behalf for a permit to erect gas works upon said premises hereinbefore described, and afterwards, on the 22nd day of November, 1901, the said Board of Fire Commissioners granted the said permit to the said plaintiff in error as hereinbefore set forth, and thereupon the said City Council of the City of Los Angeles, as soon thereafter as they met, to-wit, on the 25th day of November, 1901, attempted to pass and adopt the ordinance No. 6779, New Series, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending section 1 of said ordinance," as hereinbefore set forth; that in addition to the acts of the said municipal authorities of the said City of Los Angeles hereinbefore set forth, on or about the 7th day of October, 1901, the said City Council of the City of Los Angeles attempted to pass a certain other purported ordinance known as Ordinance No. 6726, New Series, entitled, "An Ordinance prohibiting the use of any public street or thoroughfare in the City of Los Angeles for the purpose of laying down or maintaining therein any pipe, conduit or connections therewith without a franchise," wherein and whereby the said City of Los Angeles attempted to ordain that it should be unlawful for any person, firm or corporation to lay down any pipe, conduit or connections therewith in any public street or thoroughfare in the City of Los Angeles for the purpose of supplying said city or its inhabitants with fresh water or with gas used exclusively for illu-

mination or with other illuminating light, without first obtaining a permit from the Superintendent of Streets to make the necessary excavations therefor, and that any person, firm or corporation desiring to obtain such permit should file with the Superintendent of Streets an application therefor in writing, setting forth the public streets or thoroughfares and the particular portions thereof which it was desired to excavate, the size and character of the excavation to be made, and specifically the purpose for which the pipe, conduit or connection therewith was to be used, whether for water, gas or electricity, and if for gas or electricity that said gas or electricity was to be supplied solely to said city or its inhabitants to be used exclusively for illumination, and that said application must be verified by the oath of such person, or by the oath of a member of such firm or by the oath of the president and secretary of such corporation as the case may be; that thereafter, when the said plaintiff in error, Caroline W. Dobbins, desired to make an application for permit to excavate the streets of the City of Los Angeles for the purpose of laying pipes in order to distribute to the citizens of the City of Los Angeles gas by her to be manufactured, for the purpose of supplying them with artificial light, the Superintendent of Streets of the City of Los Angeles unlawfully required of the said plaintiff in error an application therefor in writing, setting forth the public streets and thoroughfares, and the particular portions thereof, which it was desired by the said plaintiff in error to excavate, the size and character of the excavations to be made, and specifying the purpose for which the pipe, conduit or connections therewith was to be used, and that said gas was to be supplied solely for the city or its inhabitants to be used exclusively for illumination, and required that the said application should be verified by the oath of the said plaintiff in error, all of which requirements were unlawful

and were for the purpose of annoying, harassing, impeding, hindering and delaying the said plaintiff in error in her attempt to carry out successfully the lawful enterprise in which she was engaged; that thereafter, in addition to the adoption of the said purported ordinance so attempted to be adopted by the City Council of the City of Los Angeles, and in addition to the acts of the said Superintendent of Streets of the City of Los Angeles hereinbefore set forth, the said City of Los Angeles, through its City Attorney, prosecuted the proceedings instituted by the said James R. C. Burton hereinbefore set forth for the arrest of and detention of the men employed in the construction and erection of the said gas works of the said plaintiff in error; all of which acts and doings on the part of the City of Los Angeles, its municipal authorities, officers and agents, as set forth in said complaint the said plaintiff in error charged and averred were for the purpose of hindering, harassing, impeding, delaying and frustrating the efforts and attempts of the said plaintiff in error to carry out the lawful business and enterprise so undertaken by her as aforesaid, and were instituted and prosecuted for the purpose of compelling the said plaintiff in error to stop and abandon the further prosecution of said enterprise.

It is alleged in said complaint upon information and belief that the said defendant, the City of Los Angeles and the municipal authorities, officers and employees thereof were in their acts and doings hereinbefore set forth wilfully and unlawfully instigated, advised and controlled by the officers, attorneys, agents and employees of the Los Angeles Lighting Company, a corporation organized under the laws of the State of California, engaged in the manufacture and supplying of gas in the City of Los Angeles, and which said company has, for upwards of ten years last past, enjoyed a monopoly of the gas business in the said City of Los Angeles;

that said Los Angeles Lighting Company, through its officers, attorneys, agents and employees, has had sufficient influence with the municipal government of the said City of Los Angeles, and with its officers, to bring about the passage and adoption of the alleged ordinances hereinbefore set forth which the said City Council of the City of Los Angeles has attempted to adopt since the commencement of the enterprise undertaken by the said plaintiff in error, and has had sufficient influence with the officers and employees of the said City of Los Angeles to compel them to enforce and attempt to enforce the alleged ordinances so attempted to be passed and adopted by the City Council of Los Angeles as aforesaid against the said plaintiff in error, her agents, contractors and employees engaged in the erection of said gas works and the laying of pipes in the streets of the City of Los Angeles on behalf of the said plaintiff in error in enabling her to carry out the enterprise aforesaid; that all of said ordinances attempted to be passed and adopted by the City Council of the City of Los Angeles restricting the limits of the City of Los Angeles in which it was lawful to erect gas works as prescribed by the ordinance adopted by the City Council of the City of Los Angeles on the 26th day of August, 1901, herein set forth, were prepared by the attorneys and agents of the said Los Angeles Lighting Company and by them presented to the members of the City Council of the City of Los Angeles for adoption; that before the attempted adoption of the said alleged ordinance of the 25th day of November, 1901, hereinbefore set forth, the said Los Angeles Lighting Company, through its attorneys and agents, in order to comply with the rules and regulations of the said City Council that before the passage of any ordinance a printed copy thereof should be furnished to each of the members of the City Council of the said City of Los Angeles, caused to be printed and distributed to the members of the

City Council of the City of Los Angeles, printed copies of the proposed ordinance, which the said City Council afterwards, on the 25th day of November, 1901, attempted to adopt and pass as aforesaid; that the said Street Superintendent of the City of Los Angeles, under the restrictions purporting to be placed upon him by the City Council of the City of Los Angeles by the attempted adoption of the alleged ordinance number 6726, New Series, last herein referred to, being compelled to demand of the said plaintiff in error a verified application for a permit to open the streets of the City of Los Angeles for the purpose of laying pipes therein for the purpose of distributing gas by her to be manufactured, contrary to the rights of the said plaintiff in error, to use the streets of the said City of Los Angeles for the purpose of laying pipes therein, as guaranteed to her by section 19, article XI, of the constitution of the State of California, thereupon the said Los Angeles Lighting Company its agents and employees, caused to be and had printed and caused to be delivered by its agents to the said Superintendent of Streets of the City of Los Angeles, printed blanks prepared by their attorneys for applications for permits to excavate in public streets of the City of Los Angeles; that the said Los Angeles Lighting Company, its officers and agents, combining and confederating with the said James R. C. Burton and with divers and sundry persons to the said plaintiff in error unknown, have compelled the City Attorney of the City of Los Angeles and his deputies and assistants to prepare the complaints in the proceedings instituted by the said James R. C. Burton in the name of the People of the State of California against the employees of the said plaintiff in error, Caroline W. Dobbins, and her said contractors engaged in the erection of the said gas works as hereinbefore set forth, and have induced the filing of said complaints and the issuance of the warrants thereon

and the arrest and imprisonment and detention by the officers of the City of Los Angeles of the said employes; and that the said Los Angeles Lighting Company, by its officers, attorneys, agents and employes, has boasted and threatened that if the said prosecutions so instituted by the said James R. C. Burton against the employes of the said plaintiff in error and her said contractors shall fail, and if the said ordinances hereinbefore set forth shall be declared void and invalid, they will, by their influence and their efforts, secure the passage by the City Council of the City of Los Angeles of an ordinance regulating the gas business in the City of Los Angeles and requiring the payment of a license, which license they have boasted and threatened shall be prohibitory in its nature and so high as to prevent the said plaintiff in error from carrying on the business of manufacturing and distributing gas within the City of Los Angeles.

Plaintiff in error, Caroline W. Dobbins, further alleged that each and every of the acts aforesaid so performed by the City of Los Angeles, its officers, agents and employees, were done and performed, not for the purpose of protecting any public interest or preserving any public right, but that said acts and each of them were suggested and formulated by the said Los Angeles Lighting Company, its officers, attorneys, agents and employees, solely for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of that monopoly which has continued for upwards of ten years, as hereinbefore set forth, and for the purpose of depriving the said plaintiff in error of vested rights in property and of the privilege of pursuing her lawful undertaking and enterprise as the same is hereinbefore specifically set forth.

It is further alleged that the territory surrounding the premises of the said plaintiff in error, Caroline W. Dobbins,

hereinbefore described, in which the said gas works of the said plaintiff in error are being erected, and which was by Ordinance No. 6663, New Series, hereinbefore set forth, a portion of the territory within which the City of Los Angeles permitted the maintenance of gas works, is and was a district devoted to manufacturing and commercial enterprises almost exclusively; that in said district prior to the purchase of the property herein described by the said plaintiff in error and upon which the said gas works are being erected for said plaintiff in error as aforesaid, there was in operation a soap factory; that at all times since the 1st day of August, 1901, there has been and is now maintained within the district bounded by Rodondo and Alhambra streets, the Los Angeles river and San Fernando street, in said City of Los Angeles, one wool-pulling factory, which is directly across North Main street from the said premises of the said plaintiff in error, three wineries, numerous oil wells in operation, an extensive iron foundry in active operation, a brass foundry, and an extensive oil refinery; and that there is a great deal of vacant and unoccupied land which is and will continue to be comparatively worthless except for the purposes of the erection theron of manufacturing establishments; that immediately adjacent to the easterly line of said district last herein described are the tracks of the Southern California Railway, on which are operated the freight and passengers trains of the Santa Fe Railroad; that east of that and adjacent thereto is the Los Angeles river, and that east thereof is the right-of-way and tracks of the San Pedro, Los Angeles and Salt Lake Railroad; that immediately east of those tracks an extensive tannery is located and in operation; that immediately north of said district and north of San Fernando street, and adjacent to the tracks of the Santa Fe railroad are the oil tanks and refinery of the Standard Oil Company in extensive operation; that prior to the granting

of the permit by the Board of Fire Commissioners of the City of Los Angeles to the said plaintiff in error on the 22nd day of November, 1901, the said Board of Fire Commissioners and the members of said commission individually and jointly visited and examined the said premises and the said district surrounding the same, and having heard the protests of all persons who appeared before them, decided and determined by the granting of said permit that said premises were in all respects a suitable place upon which to erect the said gas works and to conduct the business of manufacturing gas.

It is alleged that said gas works are being constructed and are to be completed upon concrete foundations, with a superstructure of brick, steel and iron, of the best material procurable, and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said plaintiff in error, Caroline W. Dobbins, by the use of the said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said plaintiff in error, as hereinbefore described, or of any other of the inhabitants of the said City of Los Angeles.

It is manifest, as is alleged in said complaint, that if the said City of Los Angeles, its officers and employees, shall be allowed to arrest and to continue to arrest the

employees and servants of the said plaintiff in error, Caroline W. Dobbins, and her contractors so engaged in the completing and erection of said gas works, or in the operation and maintenance thereof when completed, and the said defendant in error, the City of Los Angeles, is allowed to carry its said threats into execution, the said plaintiff in error will be deprived of the rights of property she has already acquired and she will suffer great and irreparable loss; that already, by the acts of the said defendant in error in hindering and delaying the said plaintiff in error in manner as hereinbefore described, in the erection of said gas works and carrying out the enterprise contemplated by her of manufacturing, distributing and selling gas, the said plaintiff in error has suffered, it is alleged, damages of upwards of the sum of twenty-five thousand dollars ($25,000) in the loss of profits which would otherwise have accrued to her therefrom, that if by said acts and threatened acts of the said defendant in error the said plaintiff in error and her contractors are compelled to desist and cease the completion of said gas works, the said works partially completed as hereinbefore set forth and in their uncompleted conditon, and the said materials consisting of steel plates, iron, etc., lying unprotected and uncovered upon the premises aforesaid, are and will be exposed to the action of the elements and will be thereby greatly damaged and impaired in value and in imminent danger of complete destruction; that in the erection of said gas works, in the laying of pipe for the distribution of gas therefrom, and in the purchase of other materials to enable the said plaintiff in error to complete and carry out the said enterprise undertaken by her as aforesaid the said plaintiff in error has already paid, laid out, and expended upwards of the sum of fifty thousand dollars, over and above the cost of the premises hereinbefore described, and if the defendant in error is allowed

to carry out its said threats the said amount so paid, laid out and expended by the said plaintiff in error will become and be almost a total loss to said plaintiff in error; that in the erection and construction of said gas works skilled mechanics are necessary, and the same have been brought from divers and sundry places, from great distance from the City of Los Angeles, to wit, from Trenton, in the State of New Jersey, Philadelphia in the State of Pennsylvania, Toledo in the State of Ohio, San Francisco in the State of California, and other places, and if said City of Los Angeles is allowed to execute its said threats and arrest the said men, it is alleged said men threatened to and would leave the employ of the said plaintiff in error and her said contractors, and if said work shall be retarded and interrupted by reason of said threats and execution thereof by said City of Los Angeles, as it will be if said threats are executed, the said skilled laborers and mechanics so employed by the said plaintiff in error and her said contractors would become scattered and it would be impossible to again obtain the services of said men or the services of like men in such employment; that if said defendant in error, the City of Los Angeles, is allowed to carry out the said threats, the said employes of the said plaintiff in error and her said contractors would be subjected daily to arrests for alleged violation of the alleged ordinances, and even though the said employes should successfully defend such prosecutions, said city, defendant in error, threatened and said plaintiff in error verily believed it would continue to harrass said plaintiff in error and said employes, by repeated arrests for alleged violations of the said purported ordinances which plaintiff in error alleged to be invalid, and further, alleged that pending the final determination of the validity of said alleged ordinances by the successful completeness of the defenses interposed against said prosecutions,

the said plaintiff in error would be subjected to great expense, inconvenience and embarassment and all without any possible redress or adequate remedy at law, to the manifest injury and irreparable loss of the said plaintiff in error.

The prayer of the complaint is that the contract, entered into between the said plaintiff in error and the said defendant in error, the City of Los Angeles by virtue of the permit granted to her on the 22nd day of November, 1901, be declared and determined to be a valid and existing contract between the said City of Los Angeles and the said plaintiff in error and that all the alleged ordinances attempted to be passed by the City Council of Los Angeles in contravention thereof or in violation of the terms thereof be declared null and void as against the rights of the said plaintiff in error and that the City of Los Angeles be enjoined from enforcing the alleged ordinances numbers 6779 and 7029 against the said plaintiff in error, Caroline W. Dobbins or any of her agents, contractors, servants or employes, and from prosecuting or proceeding with any prosecutions commenced or to be commenced against the plaintiff in error or any of her agents, contractors, servants or employes, or the employes of any of them heretofore engaged or now engaged or that may hereafter be engaged in the erection of said works on the premises described in said complaint; and that the said defendant in error, the City of Los Angeles, may be enjoined and restrained from in any manner hindering, delaying or interfering with or prohibiting or preventing the said plaintiff in error from carrying out her said enterprise in erecting the said gas works upon her premises in said complaint described; and that they further be enjoined from in any way interfering with the operation or maintenance or management of the said gas works of the said plaintiff in error and for general relief.

To this complaint, on the 14th day of March, 1902, the

defendant in error, the City of Los Angeles, filed a demurrer and for ground of demurrer alleged that said complaint did not state facts sufficient to constitute a cause of action, and that the superior court of Los Angeles County had no jurisdiction of the person of the defendant or of the subject of the action.

On the hearing of this demurrer in the Superior Court of Los Angeles County, the demurrer was sustained and a judgment was entered in favor of the defendant in error on the demurrer, and for costs. From this order and judgment entered therein, the plaintiff in error, Caroline W. Dobbins, appealed to the Supreme Court of the State of California, and therein, on the 29th day of May, 1903, the Supreme Court of California filed an opinion and entered an order affirming said judgment as set forth in the transcript of the record (in the Dobbins case) herein, folios 59-65. A petition for a rehearing was filed in said cause, and afterwards, on the 27th day of June, 1903, this petition for a rehearing was denied, the Supreme Court of the State of California being divided thereon, three judges thereof agreeing upon an order to deny said rehearing, and three judges thereof dissenting. Tr. of record, folio 67.

For the reasons given in the opinion filed in the case of Caroline W. Dobbins vs. the City of Los Angeles, the Supreme Court of California discharged the writ of habeas corpus in the case of Martin Daly and remanded the prisoner to the custody of the Chief of Police of the City of Los Angeles. A petition was filed in this Daly case for a rehearing and a rehearing denied with a like result as in the Dobbins case. Transcript of record in the Daly case, folios 48 to 57, inclusive.

The petition for the writ of habeas corpus by the plaintiff in error, Martin Daly, was filed on the 30th day of June, 1902, at which time he was imprisoned, restrained

and confined of his liberty by Charles Elton, Chief of Police of the City of Los Angeles, defendant in error, by virtue of the warrant of arrest issued out of the Police Court of the City of Los Angeles on the 6th day of March, 1902, charging that the said petitioner, Martin Daly, and others therein named, had on the 6th day of March, 1902, in the City of Los Angeles, committed a misdemeanor in wilfully and unlawfully erecting and causing to be erected, maintained and causing to be maintained, certain works, establishment and manufactory for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described in the ordinance in said petition for the writ of habeas corpus and hereinbefore set forth as the ordinance adopted by the City of Los Angeles on the 26th day of August, 1901, and the amendment thereto adopted on the 3rd day of March, 1902.

Martin Daly, the plaintiff in error, was the foreman in charge of said work and was acting as foreman for Davis & Farnum Manufacturing Company, in charge of the erection of the gas holder, and water tank of said gas works. The petition set forth the same facts that are set forth in the bill of complaint of Caroline W. Dobbins, as hereinbefore stated, and in such petition for a writ of habeas corpus, the said petitioner sought to have declared and determined that said complaint upon which petitoner was charged, did not state a public offense in that said alleged ordinances of the City of Los Angeles were void and invalid ordinances as against the valid rights acquired by said Caroline W. Dobbins and the said petitioner as her employee in the erection of said works.

It was contended and averred on behalf of plaintiff, in the Dobbins case, and in the petition for a habeas corpus, in the Daly case, that the ordinance attempted to be adopted

by the City of Los Angeles on the 26th day of August, 1901, entitled "An ordinance prohibiting the erection and maintenance of gas works, gas tanks and reservoirs within certain portions of the City of Los Angeles," and the amendment thereto of March 3rd, 1902, are void and invalid ordinances and were in violation of the provisions of the Constitution of the State of California and the provisions of the Fourteenth amendment of the Constitution of the United States, in that it was an attempt on the part of the City of Los Angeles to make and enforce a law which abridged the privileges and immunities of the citizens of the United States in that it attempted to prohibit the erection or maintenance of any works, or establishment or manufactory for the manufacture of gas, and the storage of gas within the corporate limits of the City of Los Angeles, except within the limits described in said ordinances for that said business of erecting and maintaining gas works was not a nuisance, but was a lawful occupation and protected by the provisions of Section 19, Article 11, of the Constitution of the State of California.

It was contended and averred in both the complaint of the said Caroline W. Dobbins, plaintiff in error, and in the petition for the writ of habeas corpus of the said Daly, that the ordinances attempted to be adopted by the City Council of the City of Los Angeles on the 25th day of November, 1901, and on the 3rd day of March, 1902, were void and invalid in that they were uncertain and unreasonable and were an attempt to regulate in an unlawful manner and without authority, the business of erecting gas works within the City of Los Angeles and were in violation of the rights secured and granted to the plaintiff by the City of Los Angeles on the 22nd day of November, 1901, and were in violation of the provisions of the Constitution of the State of California and of the Constitution of the United States,

prohibiting the passing of any laws impairing the obligations of contracts.

It was contended and averred in both the complaint of the said Caroline W. Dobbins, plaintiff in error, and in the petition for writ of habeas corpus of the said Daly, that the ordinances in question were unreasonable and oppressive, and therefore void, and infringed the rights guaranteed by the Constitution of the United States, as intending to deprive the said plaintiffs in error of their property without due process of law, and that they were not adopted by the City Council of the City of Los Angeles in the exercise of a reasonable discretion, but were a mere exercise of an unjust discrimination and to the oppression of the said plaintiffs in error.

Said ordinances are in violation of the Fourteenth Amendment of the Constitution of the United States as denying to all persons within the jurisdiction of the City of Los Angeles the equal protection of the law, and as being passed in an attempt on the part of the authorities of the City of Los Angeles to foster a monopoly, and to protect the Los Angeles Lighting Company in the enjoyment of a monopoly of the business of manufacturing and distributing gas in the City of Los Angeles and for the purpose of discriminating against the said plaintiff and to prevent her from establishing and maintaining a gas works within the limits of the City of Los Angeles.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of the State of California erred in deciding that the ordinance adopted by the City Council of the City of Los Angeles on the 26th day of August, 1901, number 6663, new series, entitled "An ordinance pro-

hibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles" was a valid ordinance, and that it was not in violation of the provisions of the Constitution of the State of California, and the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it was an attempt upon the part of the City of Los Angeles to make and enforce a law which abridged the privileges and immunities of the citizens of the United States.

II.

The Supreme Court of the State of California erred in deciding that the ordinance adopted by the City Council of the City of Los Angeles on the 3rd day of March, 1902, Number 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs, within certain portions of the City of Los Angeles, approved August 26, 1901,' by amending section one of said ordinance" was valid as to the rights of the said plaintiff in error, Caroline W. Dobbins, acquired before the passage of said ordinance, and as against the rights of the said plaintiffs in error, Martin Daly, as an employee of Caroline W. Dobbins, acquired before the passage of said ordinance.

III.

The Supreme Court of the State of California erred in deciding that the ordinance adopted by the city council of the City of Los Angeles on the 3rd day of March, 1902, No. 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or

reservoirs within certain portions of the City of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," was a valid police regulation, lawfully adopted by the city council of the city of Los Angeles in the lawful exercise of the police power granted to the city of Los Angeles by statute of the State of California, by its charter, and by the constitution of the said State.

IV.

That the Supreme Court of the State of California erred in deciding that the ordinance adopted by the city council of the city of Los Angeles on the 3rd day of March, 1902, No. 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," was not an invalid ordinance as an unwarranted interference with the enjoyment of the property rights of the said plaintiff in error, Caroline W. Dobbins, and of the said plaintiff in error, Martin Daly, as the employee of said Caroline W. Dobbins, acquired prior to the adoption of said ordinance, and as in impairment of the obligation of contracts made before the passage of said ordinance.

V.

That the Supreme Court of the State of California erred in deciding that the ordinance adopted by the city council of the City of Los Angeles on the 3rd day of March, 1902, No. 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks

or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," was not an invalid ordinance as abridging the privileges and immunities of the said plaintiff in error, Caroline W. Dobbins, or the said plaintiff in error, Martin Daly, her employee, as depriving the said Martin Daly and his employer, the said Caroline W. Dobbins, of property rights acquired prior to the adoption of said ordinance, without due process of law.

VI.

In the case of Caroline W. Dobbins, the Supreme Court of the State of California erred in not determining that the said plaintiff in error, Caroline W. Dobbins, was entitled to relief in a court of equity enjoining the defendant, the City of Los Angeles, from enforcing, by a criminal prosecution, the said ordinance as invalid, and as infringing the said property rights of the said Caroline W. Dobbins.

VII.

In the case of Caroline W. Dobbins, the Supreme Court of the State of California erred in giving judgment for said defendant in said action and against the said plaintiff in error.

VIII.

In the case of Caroline W. Dobbins, the Supreme Court of the State of California erred in affirming the judgment of the Superior Court of the State of California therein.

IX.

In the case of Caroline W. Dobbins the Supreme Court of the State of California erred in not reversing the judgment

of the Superior Court of the State of California in said case and directing said Superior Court to enter a decree therein overruling the demurrer to the complaint therein and ordering that the said defendant be enjoined and restrained from enforcing the said ordinance against the said plaintiff Caroline W. Dobbins.

X.

In the case of Martin Daly, the Supreme Court of the State of California erred in not holding that the matters charged in the complaint against the said Martin Daly did not constitute a public offense by common law or under any ordinance of the city of Los Angeles, or any law of the State of California, or under any statute of the United States.

XI.

In the case of Martin Daly the said Supreme Court of the State of California erred in not holding that the said police court of the City of Los Angeles had no jurisdiction to issue a warrant for the arrest of the said Martin Daly.

XII.

In the case of Martin Daly, the Supreme Court of the State of Californa erred in not holding that the said defendant in error, Charles Elton, Chief of Police of the City of Los Angeles, had no authority to arrest or detain the said plaintiff in error, Martin Daly.

XIII.

The Supreme Court of the State of California erred in not discharging the said Martin Daly, plaintiff in error, upon the return of the writ of habeas corpus herein.

BRIEF.

I.

In passing upon a municipal ordinance, it is necessary to its validity that its provisions should be determined to be reasonable.

Town of Oxanna v. Allen, 90 Ala. 468.
Tugman v. Chicago, 78 Ill. 405.
Chicago v. Rumpf, 45 Ill. 90.
Toledo Railroad v. Jacksonville, 67 Ill. 37.
Lake View v. Tate, 130 Ill. 247.

II.

The determination by the legislative body of what is a proper exercise of the police power is not final nor conclusive, but is subject to the supervision of the courts, and what is a reasonable ordinance is a judicial, and not a legislative, question.

Covington Turnpike Co. v. Sanford, 164 U. S. 578, 592,
Lawton v. Steel, 152 U. S. 153.
Holden v. Hardy, 169 U. S. 366.
In re Smith, — Cal. —; 77 Pac. Rep. 180.
Ex parte Whitwell, 98 Cal. 73.
Ex parte Sing Lee, 96 Col. 354.
Tiedman on State and Federal Control, 1, p. 238.
Jew Ho v. Williamson, 103 Fed. 10, 17-20.

Weill v. Ricord, 24 N. J. Eq. 169.
Yates v. Milwaukee, 10 Wall. 497.
People v. Budd, 117 N. Y. 1.

CONTRA:

Dobbins v. City of Los Angeles, Tr. of record, fols. 59-65.

DISTINGUISHED.

Munn v. Illinois, 94 U. S. 113; and also
Maxwell v. Fulton, 119 Ind. 23.
Whittington v. Pope, 1 Har. & J. 236.
Cooley's Const. Lim. 6 Ed. page 247, *et seq.*

In these last three citations it is shown that the legislature is distinguished from a municipal council in enacting its police provisions and is not subject to review by the courts merely because their laws may be unreasonable.

III.

In determining the validity of an ordinance the objects and purposes sought to be accomplished are always scrutinized by the courts, and in so doing they are not limited to those matters which appear upon the face of the ordinance or of which they may take judicial notice, but may consider all the circumstances in the light of existing conditions.

Town of Oxana v. Allen, supra.
Tugman v. Chicago, 78 Ill. 405, 409.
Chicago v. Rumpff, 45 Ill. 90.
Toledo, etc. R. R. v. Jacksonville, 67 Ill. 37.
Lakeview v. Tate, supra.
Ex parte Patterson (Tex.) 58 S. W. Rep. 1011.
People v. Armstrong, 73 Mich. 288.
Wreford v. People, 14, Mich. 41, 46.

Cleveland Ry. Co. v. City of Connersville, 147 Ind. 277.
State v. Boardman, 93 Me. 73.
Corregan v. Gage, 68 Mo. 571.
Pieri v. The Mayor, 42 Miss. 493.
Town of Kosciusko v. Slomberg, 68 Miss. 469.
Crowley v. West, 52 La. An. 526.

IV.

The motives which actuate a municipal council in the adoption of ordinances are material as showing the objects and purposes for which the ordinances are adopted.

Yick Wo v. Hopkins, 118 U. S. 356.
In re Ho Ah Kow, Fed. Case No. 6546.
C. B. & Q. Railroad v. Chicago, 116 U. S. 234.
Dill. on Mun. Corp., 4th Ed. sec. 311.
State v. Cincinnati Gas Light Coke Co., 8 Ohio St. 262.

V.

The ordinance of the City of Los Angeles adopted on the 26th day of August, 1901, is invalid and not binding upon the plaintiffs in error as against their right to conduct a lawful business of erecting gas works and manufacturing gas for the following reasons:

1. It is in violation of the rights, privileges and immunities of a citizen of carrying on a lawful occupation within the City of Los Angeles.

(a) The business of erecting or maintaining a gas works is a lawful occupation.

Constitution of the State of California, Article XI, Sec. 19.

Ex Parte Johnson, 137 Cal. 115.
People v. Stevens, 62 Cal. 209.

(b) A municipality has not the power or right to impose additional burdens or terms or conditions to the exercise of rights created by the sovereign authority of the State in its Constitution. Restrictions in the exercise of these rights are not regulations and at least impair if they do not deny the exercise of the right.

Ex parte Johnson, supra.
Township of Summit v. N. Y. & N. J. Tel. Co., 57 N. J., Equity, 123.
City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106.
Michigan Telephone Company v. City of Benton Harbor, 121 Mich. 512.
Wisconsin Telephone Company v. City of Oshkosh, 62 Wis. 32.
Appeal of Pittsburg, 115 Pa. St. 4.
Borrough of Millvale v. Evergreen Railway Co., 131 Pa. St. 1.
Harrisburg City Pass. R. R. Co. v. City of Harrisburg, 149 Pa. St. 465.
State v. Flad, 23 Mo. App. 185.
Hodges v. Telegraph Co., 72 Miss. 910.

2. This ordinance is void in that it is unreasonable because it does not describe the district to which gas works shall be confined by any geographical or natural boundary or by any reasonable designation.

3. This ordinance is invalid because it is an attempt on the part of the city council of the City of Los Angeles to define and make that a nuisance which is not a nuisance *per se*.

(a) Gas works are neither in their erection nor maintenance a nuisance *per se* and it is not within the power of the city council of the city of Los Angeles to pass an ordinance making that a nuisance which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that character.

Yates v. Milwaukee, 10 Wall. 497.
C. R. I & P. R. R. v. Joliet, 79 Ill. 39.
Everett v. Council Bluffs, 46 Iowa 66.
Ex parte Sing Lee, 96 Cal. 354.
County of Los Angeles v. The Hollywood Cemetery Association, 124 Cal. 344.
Grossman v. Oakland, 30 Oregon 478.
Stockton Laundry Case, 31 Fed. 680.
In re Hong Wah, 82 Fed. Rep. 623, 624, 626.
Ex parte Whitall, 98 Cal. 73.
Wood on Nuisances, sec. 744.

(b) The power granted in the City Charter to *abate* nuisances does not give power to *prevent* except in those cases of nuisances *per se*, and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated they are nuisances.

Lakeview v. Letz, 44 Ill. 81, 83.

VI.

The ordinance number 6779 of November 25th, 1901, was repealed by the ordinance number 7029 of March 3rd, 1902. The ordinances are on the same subject matter. The latter ordinance covers the whole subject matter of the earlier and will repeal the former.

23 *American and English Encyclopedia of Law*, 485.

VII.

The ordinance of March 3rd, 1902, is invalid for the reason that it is in violation of the vested rights acquired by the plaintiff in error, Mrs. Dobbins, by virtue of her purchase of land within the limits of the district within which it was lawful to erect gas works by the terms of the ordinance of August 26th, 1901, and by virtue of the permit granted to her by the Board of Fire Commissioners of the City of Los Angeles on the 22nd of November, 1901, under the existing building and fire ordinance.

(a) The rights acquired by said plaintiff in error were vested rights.

Calder v. Bull, 3 Dall. 394.
Farrington v. Tennessee, 95 U. S. 679.
Steamship Co. v. Jolliff, 2 Wall. 457.
Worth v. Cransen, 98 U. S. 118.
Classen v. Chespeake Guano Co., 81 Md. 258.
Roberts v. Brooks, 71 Fed. Rep. 914.
Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.
Lewis v. City of Newton, 75 Fed. Rep. 884.
Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.
City Railway Company v. Citizens' Street Railway Co., 166 U. S. 562.

(b) The ordinance of March 3rd, 1902, is void as depriving the said plaintiff in error of property without due process of law.

City of Chicago v. Netcher, 183 Ill. 104.
C. B. & Q. R. R. v. Chicago, 166 U. S. 234.
Frorer v. People, 141 Ill. 171.
Ramsey v. People, 142 Ill. 380.

Braceville Coal Co. v. People, 147 Ill. 66.
Cooley Const. Lim. 393.

VIII.

The ordinance of March 3rd, 1902, is not within the police power, nor is it a proper police regulation.

(a) The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals.

Noel v. People, 187 Ill. 587.
City of Chicago v. Netcher, supra.
State v. Donaldson, 41 Minn. 74.
City of Indianapolis v. Consumers' Gas Trust Company, 140 Ind. 107.
Barthet v. City of New Orleans, 24 Fed. Rep. 564.
City of Buffalo v. Chadeayne, 134 N. Y. 163.
New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 650.
Walla Walla v. Walla Walla Company, 172 U. S. 115.

DISTINGUISHED.

Beer Company v. Massachusetts, 97 U. S. 25.
Fertilizing Company v. Hyde Park, 97 U. S. 659.
Stone v. Mississippi, 101 U. S. 814.
Slaughter House Cases, 16 Wall. 36.
Butchers' Union Co. v. Crescent City Live Stock Landing Co., 111 U. S. 746.
Ex parte Lacey, 108 Cal. 326.
Barbier v. Connolly, 113 U. S. 27.
Knoxville v. Bird, 12 Lea. 121.
Davenport v. City of Richmond, 81 Va. 636.

(b) The provisions of Section 11 of Article XI of the

Constitution of the State of California is not a grant of the police power. It is simply an extension to counties, cities and towns of the right to exercise powers that are inherent in the legislature as the representative of the people; but it is in no sense an enlargement of that power.

Ex parte Campbell, 74 Cal. 20.
Ex parte Roach, 104 Cal. 272.
County of Los Angeles v. Hollywood Cemetery Assn., 124 Cal. 344.

IX.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such criminal prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

Davis & Farnum Manufacturing Company v. Los Angeles, 189 U. S. 207.
Central Trust Company v. Citizens' St. R. Co., 80 Fed. Rep. 225; s. c. 82 Fed. 1.
Reagan v. Trust Co., 154 U. S. 326.
Southern Express Co., Mayor, etc., of Ensley, 116 Fed. 756.
Lottery Co. v. Fitzpatrick, 3 Woods, 222, Fed. Cases No. 8,541.
Springhead Spinning Company v. Riley, L. R. 6 Eq. 588.
Osborn v. United States Bank, 3 Wheat. 738.
Wood v. City of Brooklyn, 14 Barb. 425.
Manhattan Iron Works v. French, 12 Abbott's N. C. 446.

Rushville v. Rushville Natural Gas Co., 132 Ind. 575.
Davis v. Fasig, 128 Ind. 271.
Platte & D. Canal & Milling Co. v. Lee, Mayor, (Colo.) 29 Pac. Rep. 1036.
Smith v. Bangs, 15 Ill. 399.
Mayor of Baltimore v. Radecke, 49 Md. 218.
Cape May & L. R. Co. v. City of Cape May, 35 N. J. Eq. 409.
Los Angeles City Water Co. v. City of Los Angeles, 103 Fed. Rep. 711.
City of Atlanta v. Gate City Gaslight Co., 71 Ga. 196.
City of Austin v. Austin City Cemetery Association, 87 Tex. 330.
Port Mobile v. Louisville & N. Railway Co., 84 Ala. 115.
Smyth v. Ames, 169 U. S. 466, 517.
Detroit v. Detroit Citizens' Railway Co., 184 U. S. 368, 378.

X.

The plaintiff in error, Caroline W. Dobbins, has no remedy against the defendant in error for damages for the wrongful arrest of her employes or for the destruction of her business and property rights.

Steadman v. San Francisco, 63 Cal. 193.
Chope v. Eureka, 78 Cal. 508.
Doeg v. Cook, 126 Cal. 213.

XI.

It is not enough that the plaintiff has a remedy at law.

It must be as efficient and as prompt in its administration as the remedy in equity.

Boyce v. Grundy, 3 Peters 377.
Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 12.
Insurance Co. v. Bailey, 13 Wall. 616, 621.
Kilbourn v. Sunderland, 130 U. S. 505, 514.
Tyler v. Savage, 143 U. S. 79, 95.
2 Story Eq., Sec. 928.

XII.

Where a law under which a prisoner is held has been declared unconstitutional and where the unreasonableness and oppression of the ordinance is not apparent upon the face thereof, evidence in such cases will be admitted by a court of general jurisdiction upon habeas corpus showing existing conditions and for the purpose of determining whether a public offense has been committed.

Ex parte Smith, — Cal. —; 77 Pac. Rep. 180.
Ex parte Neilson, 131 U. S. 176.
Ex parte Lang, 85 U. S. 163.
Ex parte Siebold, 100 U. S. 176.
In re Coy, 127 U. S. 731, 758.
Ex parte Mayfield, 141 U. S. 107.
Yick Wo v. Hopkins, 118 U. S. 356.

ARGUMENT.

The judgments of the Supreme Court of the State of California which are called in question by these writs of error were supported by an opinion filed in the Dobbins case, and upon the authority of that opinion the judgments here sought to be reversed were rendered in both of these cases. It is therefore proper that we should present to this Court at this time this opinion. It is as follows:

This action was brought to obtain an injunction restraining the defendant, the City of Los Angeles, a municipal corporation, from enforcing certain ordinances of the city prohibiting the erection or maintenance of gas works within certain parts of said city. A demurrer to the complaint was sustained in the court below and judgment rendered for defendant. From the judgment plaintiff appeals.

On the 26th day of August, 1901, the city adopted an ordinance, No. 6663, by which it was provided that "it shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment, or manufactory, for the manufacture of gas; or any tank, reservoir, or other receptacle for the storage of gas, within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows, to-wit" (and then follows a description of the district.) It was also provided that any person who should violate the above provision should be guilty of a misdemeanor, and upon conviction be punished by fine or imprisonment or both. On the 3rd day of March, 1902, the city adopted another ordinance No. 7029, amendatory of the said ordinance 6663. This second ordinance merely amends the first by changing the boundaries of the area within which, the erection and maintenance of gas works was prohibited. These two ordinances are the only ones necessary to be considered. The plaintiff was engaged in erecting

gas works within the territory in which the erection of such works was prohibited by the second ordinance and it is averred that, by procurement of the defendant, certain employees of plaintiff engaged in labor upon her said gas works have been arrested and prosecuted for a violation of said ordinance, and that defendant threatens to continue to arrest and prosecute her employees for such violation. The prayer of the complaint is that defendant be enjoined and restrained from enforcing said ordinances and from "prosecuting or proceeding with any prosecution commenced or to be commenced" under said ordinances against plaintiff or any of her agents or employees. There are other averments in the complaint which will be noticed hereafter.

The general contention of appellant that the ordinances in question are invalid and void because violative of the 14th amendment to the Federal Constitution, and of other constitutional guaranties State and Federal of the enjoyment of property, or vested rights, the equal protection of the law, etc., is not maintainable.

The ordinances were passed in the exercise of the police power which is fully granted to the city of Los Angeles by statutory law, by its charter, and by the constitution of the State. Its charter gives it power to suppress or prohibit all offensive places of business, and to regulate or prohibit explosives, combustibles, or inflammable material within the city, or any specified part thereof.

By the act of the State legislature of April 4, 1870, entitled "An act concerning gas works," (Stats. of 1869-70, p. 815) it is provided that cities "may also control the location and construction of works so that they may be erected on suitable locations to give the least discomfort or annoyance to the public." This act was expressly continued in force by subdivision 20 of section 19 of the political code. And by the State constitution itself, (art. XI, sec. 11) it is provided that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary or other regulations, as are not in conflict with general laws." There is no doubt therefore, that the exercise of this police power belongs to the respondent within its territorial limits; and the only question is whether the adoption of the

ordinances in question was a legitimate exercise of it; for all property is held subject to that power. An ordinance obviously and undoubtedly foreign to any of the recognized purposes of the police power, and interfering with the ordinary enjoyment of the property would no doubt, be held by a court to be invalid. But where the ordinance is reasonably within a proper consideration of, and care for, public health, safety, or comfort, a court will not disturb the legislative act; it will not substitute its own views of what is proper in the premises for those of the legislative body. In *Munn v. Illinois*, 94 U. S. 113, the U. S. Supreme Court states the rule thus: If no state of circumstances could exist to justify a certain statute, then we may declare this one void because in excess of the legislative power of this State; but if it could, we must presume it did. Of the propriety of legislative interference, within the scope of the legislative power, the legislature is the exclusive judge." This rule is very fully discussed and declared in *Powell v. Commonwealth of Penn.*, 127 U. S. 617—the "oleomargarine" case. (See also, *Crowley v. Christianson*, 137 U. S. 87, and *Canfield v. United States*, 167 U. S. 518.) And it cannot be said judicially that volatile, inflammable, explosive and bad smelling gas, is not within the category of things which interfere with the public safety, welfare and comfort, and therefore beyond the reach of the police power. The exercise of this power is not confined to the regulation of only such interferences with the public welfare and comfort as come strictly within the common law definition of a "nuisance." (*Ex parte Lacey*, 108 Cal. 326; *Ex parte Schrader*, 33 Cal. 283.)

It is averred in the complaint that the said ordinances were adopted, not for the purpose of protecting public interests, but for the purpose of protecting and favoring a certain named company engaged in the manufacture and sale of gas in said city. But the motives which induce a legislative body to make a law cannot be considered in a judicial proceeding in which the validity of the law in question is involved. In Cooley's Constitutional Limitation, sixth edition, p. 231, it is said: "Although it has sometimes been urged at the bar that the courts ought to inquire into the

motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of the discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people;" and numerous authorities are referred to which sustain the text. (See also, *Hing v. Crowley*, 113 U. S. 703.)

It is also averred that prior to the adoption of the second ordinance plaintiff had made certain contracts with third parties to furnish materials for and do labor on gas works which she was about to erect, and had purchased land to be used as a site for such works within the territory where the erection of such works, under the first ordinance was permitted, and had expended a considerable amount of money in building the foundation of her contemplated works, and in partly erecting the same; and that by the second ordinance the boundaries of the district were so changed as to put her said land outside of the territory where gas works were permitted. And it is further alleged that prior to the adoption of the second ordinance she had commenced to erect her works under a permit of the board of fire commissioners of said city in pursuance of the fire and building ordinances. And she contends, that even if the general principle relied on is not maintainable, these additional facts make the second ordinance invalid as an unwarranted interference with the enjoyment of property, an impairment of the obligations of the contracts, etc. But this contention cannot be maintained. The ordinance provides that "it shall be unlawful for any person to erect or maintain" gas works outside of the described district. This language clearly includes works in course of construction as well as those to be begun in the future; and under the authorities the exercise of the police power clearly covers prohibited buildings partly erected, although great hardship to the builder may follow. It is somewhat difficult to see exactly what is the character and significance of the alleged permit

from the fire commissioners. Appellant contends that it was an express contract with the city to allow her to erect and maintain her gas works. We do not think that this conclusion results from the averments of the complaint. At all events there was nothing in this permit which took away from the city the police power which it afterward exercised. The city could not thus estop itself from making and enforcing proper police regulations. In *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, the legislature of the State had granted to plaintiff the privilege of manufacturing fertilizers in the village of Hyde Park and conveying the products through its streets, and plaintiff had expended $200,000 in constructing its plant; but it was held that notwithstanding these facts the village, by virtue of its police power, could prohibit the business and compel the plaintiff to abandon its works. In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672, the court says: "Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority." (See also *Barbour v. Connelly*, 113 U. S. 27; *Stone v. Miss.* 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 750; *Ex parte Lacey*, 108 Cal. 326.)

Our conclusion is that the ordinances here involved are valid and that therefore the judgment should be affirmed. This view makes it unneccessary to consider the question elaborately discussed by council, to-wit, whether or not a court of equity will ever enjoin a criminal prosecution.

The judgment appealed from is affirmed.

McFARLAND, *J.*

We concur:

SHAW, *J.*

ANGELLOTTI, *J.*

LORIGAN, *J.*

HENSHAW, *J.*

After this opinion was rendered, a petition for rehearing was filed in the Supreme Court of the State of California, and on the hearing of that petition for a rehearing the following order was entered.

By the COURT: Rehearing denied, June 27, 1903, Beatty, C. J., Lorigan, J., Henshaw, J., dissenting; Vandyke, J., declining to act.

In the matter of the petition of the application of Martin Daly for a writ of habeas corpus the following opinion was rendered:

By the COURT: The only ground upon which the applicant could be discharged on this proceeding, is the alleged invalidity of certain ordinances of the city of Los Angeles. But in the recently decided case of *Dobbins v. City of Los Angeles, L. A.* No. 1330, (Cal. Dec. vol. 25, p. —) the validity of those ordinances was directly involved, and it was there held that the same are valid; and on the authority of that case the prayer of the petitioner is denied.

The petitioner is remanded and the writ is discharged.

A petition for rehearing was also filed in this case similar to the petition for rehearing in the Dobbins case and with a like result, as in that case.

The opinion filed by the Supreme Court of California overlooks the fundamental principles upon which our constitutional guarantees rest. The vital and controlling principles which underlie our right to seek redress here have been overlooked. The opinion of that Honorable Court commits practically to municipal authorities the conclusive decision which has been from time immemorial regarded, and correctly so we think, within the exclusive province of the judiciary; in other words, it is held that, in violation of the constitution, a municipal council is constituted a judicial tribunal from whose decision there is practically no appeal. The Supreme Court of California in the opinion of the Dobbins case quoted with approval from *Munn v. Illinois*, 94

U. S. 113, the following language and applied it to the case at bar: "If no state of circumstances could exist to justify a certain statute, then we may declare this one void because in excess of the legislative powers of this state; but if it could, we must presume it did." If that doctrine is to be accepted as controlling the construction of *municipal ordinances* and determining their validity, it imperils every vested right in every franchise conferred by the state or by any of its agents, and places it within the power of all municipal bodies to so arbitrarily and unreasonably restrict the exercise of all valid franchises as to render them in effect null and void. We submit that the more reasonable and correct doctrine is enunciated in that portion of the opinion where Mr. Justice McFarland says: "An ordinance obviously and undoubtedly foreign to any of the recognized *purposes* of the police power, and interfering with the ordinary enjoyment of property would no doubt be held by a court to be invalid." We are here to show that the *purposes* of these ordinances were not within the recognized scope of the police power and to call also to this Court's attention the fact that the court below made no effort to pass upon the *purposes* for which these ordinances were passed. The Court below recognized this principle when it said, "But where the ordinance is reasonable with a proper consideration of and care for the public health, safety or comfort, the court will not disturb the legislative act." It will also be observed that throughout the opinion there is not a single authority referred to which supports the proposition that a court possessing the unlimited judicial powers of the Court below must be confined, in its determination of the validity of an ordinance, to the face of the ordinance itself, no matter how speciously and ingeniously drafted in order to conceal its true purpose and object and its inevitable result as shown by the admitted facts in this case.

In determining the validity of an ordinance of this character, the particular circumstances of each particular case are to be considered by the Court, and it will never be limited in its inquiry to a consideration of those matters which appear upon the face of the ordinance only.

The effect of the conclusion reached by the Court below in their opinion is substantially to assert the doctrine that in determining the validity of an ordinance extrinsic facts running to its reasonableness in the particular case in question are not to be considered. It has always been recognized by every court in the United States that in passing upon a municipal ordinance, as contradistinguished from an act of the State Legislature, its reasonableness was necessary to its validity. No such limitation as this is placed upon the action of a State Legislature; and its acts, although unreasonable, if constitutional, and within its power to enact, are held valid. [See *Maxwell v. Fulton*, 119 Ind. 23; *Whittington v. Polk*, 1 Har. and J. (Md.) 236; Cooley's Constitutional Limitations, 6th Ed. page 197, *et seq*] *A by-law or ordinance of a municipal corporation, however, must be reasonable* even though the municipality be vested with power to legislate upon the subject in question. In support of the position taken by the Court below with reference to the presumption of the existence of a state of facts which would justify the legislation we are referred to *Munn v. Illinois, supra;* but that case involved the construction of a statute of the Illinois legislature limiting the charges for grain elevator service in that state, and it had nothing whatever to do with the mode of exercising police powers by municipalities. In passing upon the reasonableness of an ordinance courts will always consider the objects and purposes of the legislation and consider this in connection with the particular facts involved.

We will cite to this Court a few of the authorities which

constitute the overwhelming declaration of this rule in the United States and in each one of these cases cited the ordinance was directed at a subject within the police power and which looked fair and honest enough on its face, but when considered in the light of surrounding facts it was determined that the ordinances were, to say the least, unreasonable.

The Supreme Court of Alabama recognized the justice of the above rule. In *Oxanna v. Allen*, 90 Ala. 468, it was said, "The ordinance in question was, in our judgment, void for unreasonableness. * * * True, it has reference to a subject-matter within the corporate jurisdiction and the rule is that in such cases a municipal ordinance will be presumed reasonable *prima facie, unless the contrary appears* on the face of the law itself, *or is established by proper evidence.*"

The Supreme Court of Illinois, in *Tugman v. Chicago*, 78 Ill. 405, at page 409, said, "If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, others from engaging in the same business would not only be unreasonable, and for that reason void, but its direct tendency *would be to create a monopoly*, which the law will not tolerate." And in the case at bar it is conceded by the demurrer that it was the purpose and object of the muncipal council in adopting the ordinance under review to maintain and foster the then existing monopoly of the gas business. (See also, *Chicago v. Rumpff*, 45 Ill. 90.)

An ordinance providing for the safety of the public by requiring a railroad to place a flagman at certain crossings is undoubtedly within the exercise of the police power; yet the Supreme Court of Illinois considered an ordinance of that character and held that in reference to the particular crossing in question it was unreasonable, as the railroad showed that they ran no trains past that crossing at night; that but

very few were run in the daytime; and that the neighborhood surrounding the crossing in question was a sparsely settled community. See *Toledo etc. Railroad v. Jacksonville*, 67 Ill. 37.

A case which approves this doctrine and the facts in which bear a significant resmblance to those in the case at bar is that of *Lakeview v. Tate*, 130 Ill. 247. The town of Lakeview provided that for the purpose of regulating the speed of railroad trains the town should be divided into two districts. In the first district the speed of passenger trains was limited to ten miles per hour (a subject undoubtedly within the police power); but in the second district no limitations upon the speed of passenger trains was placed. In considering the question of the reasonableness of the ordinance the court took cognizance of the locality and character of the portions of the town which were districted by the ordinance, and the opinion discloses and the real reason for the passage of the ordinance was that there were two rival railroads running to the City of Chicago from Lakeview; that one of the railroads, doubtless in high favor with the municipal authorities, ran its line in the district in which no limitation was placed upon the speed of trains, and that the other road, less favored in its association with the city council, ran through the district in which the ten-mile limit applied. The court considered the physical conditions existing in the two districts, recognized the fact that if one suburban road was prevented from running its trains at the same speed as its competitor under practically the same conditions, that an unlawful discrimination was being attempted by the muncipal council under the guise of an ordinance which was within the scope of the police power, and upon its face and without examining into the question of fact involved, seemed fair enough. The ordinance was held to be unreasonable and therefore void. On account of the

sound reasoning contained in this opinion and the very close analogy on the question of discrimination in the formation of districts, we respectfully urge a careful consideration of it by this Court.

We will content ourselves with merely referring to six other cases to the same effect:

Ex parte Patterson, 58 S. W. (Texas Rep.) 1011.
People v. Armstrong, 73 Mich. 288.
Wreford v. The People, 14 Mich. 41, 46.
Cleveland Ry. Co. v. City of Connersville, 147 Ind. 277.
Corregan v. Gage, 68 Mo. 541.
Pieri v. The Mayor, 42 Miss. 493.

In view of the principles which are established by the above cases, and having in mind that portion of the opinion of the court below which reads as follows, "An ordinance obviously and undoubtedly foreign to any of the recognized purposes of the police power and interfering with the ordinary enjoyment of property, would no doubt be held by a court to be invalid," we desire to call this Court's attention to the allegations of the complaint in the Dobbins case which are admitted by the demurrer in reference to those matters wherein the city might legitimately adopt police regulations affecting us, and which, as we have always conceded in this case, we would be glad to have it adopt if they applied, with reference to their restrictive provisions concerning the methods of manufacturing gas, to all the gas companies in this community.

The complaint alleges that the gas works in question are being constructed and are to be completed upon concrete foundations with a superstructure of brick, steel and iron, of the best material procurable, and are not combustible. That the same are so firmly and substantially constructed

that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most improved pattern and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said plaintiff in error, Caroline W. Dobbins, by the use of the said devices and improvements and the said machinery therein contained so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which said gas works are located on the premises of plaintiff in error, Caroline W. Dobbins, or of any other of the inhabitants of the City of Los Angeles. (Transcript Dobbins case, folios 45, 46.)

That the territory surrounding the premises upon which these works are being built is and for some years has been a district devoted to manufacturing and commercial enterprises almost exclusively; that upon the premises purchased by plaintiff in error, Caroline W. Dobbins, on which to erect her gas works, there was situated a soap factory in full operation up to the time of such purchase; and that at all times since the first of August, 1901, there have been and now are in the district surrounding said plaintiff in error property and upon which the said gas works are being built, one wool-pulling factory, which is directly across the street from the gas works, three wineries, numerous oil wells in operation, an extensive iron foundry in active operation, a brass foundry and an extensive oil refinery, together with many other commercial and industrial enterprises which are of great value to any community and which are not usually conducted in exclusive residence portions of the city. (Transcript Dobbins, folios 44, 45.)

The fact is also alleged in this complaint and conceded by the demurrer that the act of passing the ordinance in question by the City of Los Angeles was not for the purpose of protecting any public interest or preserving any public right, but that it was suggested and formulated by the Los Angeles Lighting Company, its officers, agents, attorneys and employees, solely for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of that monopoly which has continued for upwards of ten years, as in said complaint alleged, and for the purpose of depriving said plaintiff in error of the privilege of pursuing her lawful undertaking and enterprise. (Transcript Dobbins folio, 43.)

It will also be observed by this court that from the admitted facts contained in the complaint, during the time of passage of all these ordinances the district had remained the same in the general character of its occupancy, and that all these manufacturing and industrial enterprises were then and are now being conducted within the district described by the first ordinance No. 6663, which created the district in which gas works might be erected, and into which we moved and spent thousands of dollars in complying with the municipal direction.

There can be no security for property rights in the State of California or under the constitution of the United States, which can be in any way affected by municipal ordinances if, for such an arbitrary, unreasonable and questionable discrimination as the facts above set forth disclose, we have no redress before this Court. We show that the works are not combustible; we show that the district is a locality devoted to manufacturing enterprises; that other business undertakings are being conducted there which, "if they do not amount to nuisances *per se*" are quite as obnoxious from the standpoint of public health, safety and comfort as a properly conducted gas works could be; we show that the district

created by the first ordinance, and in which we were lawfully building, is of the same general character as to occupancy as the new district, and geographically a portion of the new district which the council in the next ordinance adopted as the exclusive limits within which such enterprises could be carried on. It is a legitimate conclusion from the facts which we have stated that the council did not adopt this ordinance as a health measure nor to protect the safety of the community against the making of gas, but solely for the purpose of discriminating between this plaintiff in error and the Los Angeles Lighting Company, of driving this plaintiff in error out of her lawful business by denying her the right to conduct it, and of fostering and maintaining the monopoly so long enjoyed by the company at whose instigation these ordinances were adopted. If these facts do not completely establish the unreasonableness of these ordinances, we are unable to perceive what state of facts would justify a court in holding that the police power delegated to the municipality was unreasonably exercised.

In a paper delivered before the American Bar Association at its annual meeting in 1903 by Judge Le Baron B. Colt, U. S. Circuit Judge for the First Circuit, the doctrine of reasonableness is, with all the force of a judicial utterance, declared by him as follows: "It is held that the exercise by the legislature of its great powers in an unreasonable way is not due process of law, or equal protection of the laws, within the meaning of the Fourteenth Amendment. In reaching this position, it became necessary for the court to lay down a principle which is far-reaching and fraught with momentous consequences, namely, that the question of what is reasonable is a judicial, and not a legislative, question. As this question was first left by the court in *Munn v. State of Illinois, supra*, it might have been supposed that it was for the legislature to determine what is reasonable. In the subsequent case, however, of *Chicago*

Railway Company v. Minnesota, 134 U. S. 418, it was decided that the legislature could not authorize the imposition of unreasonably low rates, since such action would deprive railroads of their property without due process of law. And in later cases it has been authoritatively adjudicated that the question of what is reasonable is for the court, and not for the legislature. In *Covington Turnpike Company v. Sanford, supra*, the court declared:

" 'There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such act of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of equal protection of the laws.'

"The paramount inquiry by the Supreme Court in all cases involving the exercise of the police power is whether the action of the legislature is reasonable under the circumstances, or an arbitrary and unreasonable interference with individual liberty. An admirable summary of the court's views on this important subject is found in *Lawton v. Steele*, (152 U. S. 133.)

" 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

"In the close of the opinion in *Holden v. Hardy*, (169 U. S. 366), after an elaborate review of the cases and underlying principles, the Court said:

"'The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.'"

The same doctrine has been extended by this Court to the executive branch of the government (*Yick Wo v. Hopkins*, 118 U. S. 356) where the petition for the writ set up matters which did not appear upon the "face of the ordinance," and which led the Court to the conclusion that the ordinance was invalid because of its unequal and partial enforcement.

The Supreme Court of the State of California since the rendering of the opinion in the Dobbins case above referred to, seems to have come to another conclusion than that annunciated in the opinion in the Dobbins case in reference to the power of the courts to judge as to whether an ordinance or an act of the legislature is a reasonable restraint upon the constitutional right of a citizen to pursue any trade, business or vocation which in itself is recognized and useful in a community, and they have declared themselves, in language not to be misunderstood, that *it is always a judicial question if any particular regulation of such a right is a valid exercise of the police power.*

In an opinion rendered by that Court on the 30th day of May, 1904, in the case of *Ex parte Smith* on habeas corpus, the following opinion was rendered:

HENSHAW, J. The petitioner is in custody for the alleged violation of a criminal ordinance of the county of Los Angeles, making it a misdemeanor to erect or maintain gas works, gas holders, gas tanks, etc., within a boundary fixed in the ordinance. Before the passage of the ordinance, petitioner and others had erected the gas works within the district and were supplying gas to consumers, inhabitants of the cities of Pasadena and Los Angeles. After his works were so in operation the ordinance in question was adopted.

Its effect, if valid, is to suppress his business. In his petition he set up, with other matters, that the district within which it is declared to be illegal to erect or maintain gas works is a sparsely settled rural community lying between the cities of Los Angeles and South Pasadena on the south and the city of Pasadena and the city of Los Angeles upon the north, through the center of which runs a wash which is known as the Arroyo Seco. This wash is a sandy, rocky waste, between 200 and 300 yards in width, and constitutes 95 per cent. of the district described in the ordinance. In the immediate vicinity of the gas works there are no dwelling houses, none nearer than a distance of about 300 yards, and the whole district contains only 15 places of habitation. It is further alleged that the works are safely and securely constructed, so as to be free from danger from leakage or explosion of gas; that the gas made is such as is ordinarily distributed to consumers in the various cities of the state; that it is impossible, owing to the secure method of construction, for any odors to escape; and that the works as constructed and operated do not and cannot injuriously affect the health, safety, welfare, or comfort of the citizens of the county of Los Angeles, or of any of them. Other matters are set forth, touching the motive of the board of supervisors in passing the ordinance; it being herein asserted that it was passed to perpetuate the monopoly of another gas company. The ordinance itself is fully set forth in the petition.

It being within the powers of the board of supervisors in proper cases to regulate, or even to prohibt, the manufacture of gas within prescribed limits, this ordinance upon its face would appear to be innocuous and valid. It became necessary, therefore, for the pleader in his petition to set forth the matters *de hors* the ordinance, by virtue of which he contends that the ordinance is unreasonable, oppressive and void. Upon the issuance of the writ the constable made the return contemplated by law, showing that he held the petitioner under a criminal complaint and warrant of arrest upon the charge of violating the ordinance. He further made return that he had no information or knowledge of the other facts set up in the petition for the purpose of showing

its unreasonableness, and the case was submitted on the theory that those alleged facts are true. Under our practice, upon the filing of the return, the petition is treated as a traverse to it. Then, if any of the matters in the petition, so treated as a traverse to the return, are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them. In the absence of such issue joined, the facts set forth in the petition will be taken as true. So, in this case, the facts averred will be considered as admitted.

It will not be disputed that the business, here sought to be prohibited is not only legitimate and useful, but even necessary, to our present civilization. Moreover, under the very terms of our Constitution, it is a recognized lawful occupation. Const. art. 11, sec. 19. The county of Los Angeles, therefore, has no power to prohibit the manufacture of gas, though it may, in the legitimate exercise of its powers, regulate its manufacture and the places thereof. Upon the other hand, the right of cities and counties within this state to pass ordinances, in the exercise of the police power, comes direct from constitutional grant. Const. art. 11, sec. 11. It is by virtue of this constitutional grant that the respondent argues that courts in construing the validity of the ordinance will take into consideration only the face of the ordinance and such facts as are within the judicial cognizance of the court, and herein reliance is had on the language of the Supreme Court in *Munn v. Illinois*, 94 U. S. 113, which declares: "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state; but, if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge." But, running current with this principle, and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of

such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution. *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870; 19 L. R. A. 727, 35 Am. St. Rep. 152. Indeed, the Supreme Court of the United States, in cases later than that of *Munn v. Illinois*, has set at rest any doubt that might exist as to the meaning of the language employed in the earlier case. In *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. Ed. 385, it is said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." And again in *Holden v. Hardy*, 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. Ed. 780, the court says: "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

As has been said, there must always be left a large discretion in the legislative body, with the exercise of which the courts will not, and have no desire to, interfere. Nor will they in any event interfere, except where the case be plain that needless oppression is worked and constitutional rights invaded. But courts are not limited in their inquiry to those cases alone, where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions. In city ordinances, as distinguished from county ordinances, the inter-

est and requirements for protection of a thickly settled and growing community will often be widely different from those of sparsely settled and thinly inhabited rural districts. An ordinance limiting, regulating, or even prohibiting, in a certain district within the corporate limits of a city, may be perfectly reasonable, where like limitations, restrictions and prohibitions as to some district within the county, arbitrarily carved out, would be oppressive and unreasonable in the extreme. Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police powers; but, as the same conditions do not exist in the country, county ordinances, passed in the exercise of the same power, may well be scanned with more critical eye. And, as it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof, evidence in such cases will be admitted to show the existing conditions. But this evidence will not go to motive. If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. This is but in accordance with the well-settled rule, and for that reason the allegations touching the motive of the board of supervisors in passing the ordinance here under consideration have been and are entirely disregarded. But in support of the proposition above declared, that the conditions and circumstances upon which the ordinance bears are proper subjects of evidence, may be cited *Yick Wo. v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Tugman v. Chicago*, 78 Ill. 405; *Oxanna v. Allen*, (Ala.) 8 South. 79; *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275; 2 L. R. A. 721, 16 Am. St. Rep. 578; *Ex parte Patterson* (Tex. Civ. App.) 58 S. W. 1011, 51 L. R. A. 654; *Cleveland Railway Co. v. Connersville* (Ind. Sup.) 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418; *Pieri v. Mayor, etc., of Shieldsboro*, 42 Miss. 493; *Town of Kosciusko v. Slomberg*, 68 Miss. 469, 9 South, 297, 12 L. R. A. 528, 24 Am. St. Rep. 281; *Corrigan v. Gage*, 68 Mo. 541.

When, finally, we come to apply these principles to the

ordinance in question, the need of discussion is at an end. It is manifest that the ordinance is unreasonable and oppressive, works an invasion of the petitioner's constitutional rights, and is therefore void. The ordinance being void, the criminal proceedings against petitioner founded upon the ordinance are likewise void.

It is therefore ordered that the petitioner be discharged from custody.

We concur: McFARLAND, J.; LORIGAN, J.; BEATTY, C. J.

SHAW, J. I concur in the opinion of Justice HENSHAW, and in the conclusion reached by him. The Court will take judicial notice of the fact that the County of Los Angeles is a large territory, consisting of several thousand square miles, large portions of which are very sparsely settled, and within which are a number of cities and villages, ranging in population from over 100,000 to a few hundred, and many districts of thickly settled farming communities. It appears from the face of the ordinance that the Board of Supervisors selected from all this territory, having these varying conditions, a small district, comprising but 200 or 300 acres, lying between the cities of Pasadena and South Pasadena on the one side and the City of Los Angeles on the other, and, ignoring the welfare and comfort of all the other territory of the county outside of incorporated cities, made it unlawful to erect or maintain gas works within this particular district. Another fact, so obvious that I think the Court can either take judicial notice of it or assume it to be true, is that there are very many other districts within the county of equal or greater extent, within which the erection or maintenance of gas works would be equally detrimental to the inhabitants thereof. It is admitted that at the time this ordinance was passed the petitioner and others acting with him had already, at great expense, erected gas works in this district, wherein they were manufacturing gas for sale and distribution to the public, and that the district is sparsely settled, having no places of residence within 300 yards of the gas works, and only 15 in all. Under these circumstances I think the Court is justified in holding that the ordinance in question was

manifestly intended to prohibit and suppress the particular business of the petitioner; that it was not a reasonable or *bona fide* exercise of the police power for the welfare and comfort of the inhabitants of the district or of the county, but an attempt, under color of the police power, to create an unjust, arbitrary and unreasonable discrimination against the enterprise in which the petitioner was engaged; and that for that reason it is unconstitutional and void.

I concur: ANGELLOTTI, J.

The motives which actuate a municipal council in the adoption of ordinances are material as showing the objects and purposes for which the ordinances were adopted.

The paragraph of the opinion of the Court below which is devoted to a discussion of the materiality of our allegations concerning the motives which actuated the municipal council of the City of Los Angeles cites as authority for the position taken Cooley's Constitutional Limitations and the case of *Soon Hing v. Crowley*, 113 U. S. 703. As to the correctness of the general proposition enunciated by Judge Cooley in the quotation referred to by that Court, we have no doubt, but the principle laid down by him and the cases cited in support of it will, upon an examination, be seen to relate to a case in which a valid law enacted with full power by a *legislative body* is attacked solely on the ground that the motives of that legislative body were improper. We have never in this case contended for any different principle of law. We recognize that if a state legislature having full power to enact a valid law does so under the influence of motives, no matter how improper or illegal, the law itself will be valid. What we do say, is that if a *quasi legislative body of a municipal corporation* enacts an ordinance which has for its purpose an object which in itself is not recognized by law, the motives actuating such quasi legislative body may be shown

in order that "the purpose and object" of the enactment may be determined so that the reasonableness of that purpose and object may be ascertained. In support of this proposition we cite this Court to Cooley's Constitutional Limitation (6th Ed.) page 247, where it is said: "And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating damages." If, in our presentation of this question to this Court, we use the term "motive," in reference to the influence which was exerted upon the municipal council of the City of Los Angeles, it is not employed with the significance attached to it that is given by the Court below. All we say now, and all we have ever meant to say, is that as evidence of the purpose of municipal legislation it is competent to show that the municipal legislature desired and intended to discriminate between different classes of persons or different persons in the same class. We think we have established, by the cases cited under the last point, the fact that if an ordinance in its effect accomplishes unreasonable results the ordinance is invalid, and the safest guide to determining the effect of an ordinance such as the one under consideration is, we think, first, its actual operation, and, second, facts which show that the municipal authorities intend that it should operate in the unjust and discriminatory way in which it does. It is probably true that for the enactment of an unjust and discriminatory measure by a municipal corporation one remedy is to be found at the polls, but the case of *Soon Hing v. Crowley, supra,* cited in this connection by the Court below, was on this very proposition overruled by *Yick Wo v. Hopkins,* 118 U. S. 356. There an ordi-

nance of the City and County of San Francisco was under consideration. The ordinance provided that it should be unlawful to maintain and carry on laundries in certain designated buildings in said city. After practically holding that the ordinance on its face was a good ordinance, and that the subject of the legislation was within the police power, this Court discussed a question which comes very close to the motives of municipal legislatures in enacting laws. This Court said: "In the present cases we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinance complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration, for the cases present the ordinances in actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons, as to warrant and require the conclusion that *whatever may have been the intent of the ordinance as adopted*, they are applied by the public authorities charged with their administration, and thus representing the state, with a *mind so unequal* and *oppressive* as to amount to a practical denial by the state of that equal protection of the laws, which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment of the Constitution of the United States. Though the law itself *be fair on its face* and *impartial in its appearance*, yet, if it is applied and administered by public authority with an *evil eye* and an *unequal hand* so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. * * * It appears that both petitioners have complied with every requisite deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to the public health. No reason whatever, except the *will of the supervisors*, is assigned why they should not be permitted to carry on in the customary manner their harmless and useful occupation on which they

depend for a livelihood, and while this consent of the supervisors is withheld from them and from two hundred others who have complained, all of whom happen to be Chinese subjects, eighty others not Chinese subjects, are permitted to carry on the same business under similar conditions. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists, except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is *a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.*" (See also *Matter of Ho Ah Kow*, Federal case No. 6546. Opinion by Mr. Justice Field.)

Will the law justify and sustain an ordinance which, though more adroitly drawn and speciously framed, brings about the same discrimination between citizens which is so unsparingly condemned in the case above cited? Can the conclusion be resisted that in the case at bar the plaintiffs in error have been denied that equal protection of the law which is assured them by the provisions of the Federal Constitution? This Court will not assert that an ordinance, which was framed solely for the purpose of driving this plaintiff in error, Mrs. Dobbins, out of a lawful business, is to be upheld merely because the object and purpose of its adoption, which we have shown, and which is admitted by the demurrer, was an improper one, could not be inquired into if the measure under consideration had been adopted by a state legislature, unhampered by the limitation that its enactment should be *reasonable*.

So far has this Court gone in preventing discriminatory legislation that it has extended the above doctrine to all branches of the government, executive, legislative and judicial, and held that where an agent of the state, in whatever department, violates the Fourteenth Amendment of

the Constitution and discriminates between citizens, it is the act of the state itself, and therefore void. See *C. B. & Q. R. R. v. Chicago*, 166 U. S. 234, and cases there cited.

The Court below decided that it is a proper exercise of the police power to regulate the manufacture of gas. This proposition we have never controverted, but have always expressly admitted. What we do say, is that an ordinance within the police power, if unreasonable, if prohibitive, if passed for the purpose of sustaining a monopoly and discriminating between citizens in violation of the Fourteenth Amendment to the Federal Constitution, is invalid and of no effect, even though the general subject covered by the ordinance is one within the police power of a municipality to regulate.

The Act of the State Legislature of California of April 4, 1870, entitled "An Act concerning Gas Works," cannot limit the effect of the constitutional provision.

The act above referred to (Statutes of 1869 and 1870, page 815) is referred to by the Court below as conferring power upon the municipality to "control the location and construction of works so that they may be erected on suitable localities to give the least discomfort or annoyance to the public." The act itself, and Subdivision 20 of Section 19 of the Political Code continuing it in force, were both adopted long prior to the constitutional amendment. There are other rights and privileges conferred upon the municipality by that statute which would, if permitted to prevail at this time, undoubtedly override the Constitution. We are not aware of any reason why, under that statute of 1870, a gas company could not be granted a limited franchise by a municipality to distribute gas to the citizens of the city for the sole purpose of illumination and prohibiting the gas company from selling or collecting any tolls or

rates for gas used by the citizens for any other than illuminating purposes. Yet, the case of *ex parte* Johnston *supra* establishes the rule that, since the adoption of the Constitution, any attempt on the part of the city to limit the exercise of the franchise thereby conferred is absolutely void. We do not think that a fair construction of that portion of the act of 1870 referred to by the Court below will result in sustaining the right to arbitrarily and without any reason locate the works in one portion of a city, and then, when the works are half built, recall its direction as to location, change its municipal mind, as to where the best place to locate them may be, compel the abandonment of the property and the loss of the investment already made, simply because the act says that the city may in the first instance locate; and yet, that is exactly what was done to this plaintiff here. If the act of 1870 is still in existence and can override a constitutional provision adopted ten years afterwards, it amounts merely that they may provide one location for it and after that they may keep changing the locations after large sums of money have been spent on them, and continue so to do until the humble supplicant has been disheartened and financially ruined.

We contend that this act of April 4th, 1870, is not in full force, for the reason that the act itself and the act continuing it in force was adopted for the purpose of giving to individuals and corporations the privilege of supplying a municipality with gas under conditions that might be prescribed by municipal authorities as to the use of the streets and thoroughfares thereof, and that the right to designate the place within said city limits where gas works should be erected was simply a condition annexed to the license; and that by the adoption by the people of the State of California of Section 19 of Article XI of the Constitution of that State in 1879, they by implication repealed the act

of the Legislature of April 4th, 1870, by granting a franchise independent of the consent of the municipality. Under the present Constitution the necessity of the provisions of that act as to securing the franchise from the municipality no longer exist, and the right of the municipality to impose as a condition of the grant the determination of the location of the gas works has been abrogated.

By the people of the State of California in their Constitution giving to every individual or corporation organized for that purpose the use of public streets for the purpose of laying down pipes and conduits therein for the purpose of supplying the municipality with gas, they impliedly repealed previous acts of the Legislature covering and intended to cover the same subject. In the Constitution there are no conditions to the grant. The people of the State of California by the adoption of the Constitution chose to take away from the municipality the power to grant or refuse permission to use the public streets with or without any condition whatsoever. (*Ex parte Johnston, supra, People v. Stephens*, 62 Cal. 209.) And the Constitution having given this right to use the public streets and thoroughfares of the municipality, it carried with it the implied right to any individual to erect and maintain gas works at any place within the limits of the municipality which the individual might select; and it is submitted that if the City Council have authority to pass a law limiting the district in which it shall be lawful to erect gas works, that by continuous limitation and exercise of that power they could abrogate and nullify this provision of the Constitution of this State.

The people of the State of California, with a law upon the statute books authorizing the municipality to grant the privilege to individuals to use the public thoroughfares for the purpose of supplying the cities with gas, coupled with the right to control the place of the location of the gas

works, chose to take away from the municipality any voice in the matter, and by an absolute constitutional grant gave to every individual or corporation organized for that purpose the right to use the public streets without any condition whatsoever as to the place or places in which the gas works should be erected.

Further on herein we state fully our position concerning vested rights, and will not discuss that point here further than to say that the authority referred to by the Court below, *Fertilizing Company v. Hyde Park*, 97 U. S. 659, merely holds that the State cannot estop itself from exercising its police power in a proper case. A perusal of the opinion will show that the nuisance abated in that case was of the most extreme type imaginable, and the principles there enunciated support the contention that we have always advanced here, that when our gas works in fact become a nuisance to such an extent that their operation nauseates the inhabitants of the surrounding territory and, in addition to rendering life unbearable in their immediate vicinity, cause sickness and disease, the State may prevent their further operation; but until our works become a nuisance in fact, the municipality cannot anticipate, with the aid of their imagination, that that condition will inevitably arrive. But without regard to the question as to whether we have any vested rights or not which protect us from the exercise of the police power, we do contend that whether in violation of the Constitution or in the exercise of the power sought to be conferred by the Act of 1870, the municipality cannot, after having designated certain property upon which we should build our works, revoke that designation and, without any reason being shown for it, deny us the privilege of operating works which have been nearly completed under their express direction and control, and that, on the theory, not that the works themselves will in

any way affect the health, safety and welfare of the community, but because the gas, when made, may prove injurious to the public health and safety.

We have thus far discussed the opinion rendered by the Court below in rendering the judgments, to reverse which these writs of error are prosecuted. We desire now to discuss the questions which are presented directly by the assignment and specification of errors herein.

FIRST: THE ORDINANCE OF AUGUST 26, 1901, IS A VOID AND INVALID ORDINANCE FOR THE FOLLOWING REASONS:

1. It is in violation of the rights and privileges and immunities of a citizen to carry on a lawful occupation within the City of Los Angeles.

The ordinance provides that it shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment, manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the limits of the described district. We contend that this is in violation of our rights as guaranteed to us by the Constitution of the State of California and by the Fourteenth Amendment to the Constitution of the United States.

The Constitution of the State of California, Section 19, Article XI, provides that "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes

and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It is in the record of these cases that there are no public works owned or controlled by the City of Los Angeles for supplying the same with artificial light.

In reference to this provision of the Constitution of the State of Caliifornia, the Supreme Court of the State of California, *ex parte Johnston,* 137 Cal. 115, said:

> "In *People v. Stephens,* 62 Cal. 209, the above section was construed by this Court, and was held to be a direct grant from the people to the persons therein designated, of the right to lay pipes in the streets of a city for the purposes specified, without waiting for legislative authority, or being subject to any restrictions from that branch of the government, the Court saying, with reference to the privilege of laying pipes in the public streets and thoroughfares of any city: "That privilege is expressly granted by the section of the constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages, and indemnity for damage, and upon the condition that the municipal government shall have the right to regulate the charges thereof." The only limitations upon this privilege are those contained in the language in which it is granted, viz., that the work shall be done "under the direction of the Superintendent of Streets, or other officer in control thereof," and "under such general regulations as the municipality may prescribe for damages and indemnity for damages." Upon a compliance with these conditions any individual or company duly incorporated for such purpose is given the privilege "of using the public streets and thoroughfares thereof, and of

laying down pipes and conduits therein, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes." The municipality may prescribe regulations "for damages and indemnity for damages," but these regulations must be "general," i. e., uniform in their application to all who may desire to exercise the privilege.

The designation of "damages and indemnity for damages" as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others which may, at least, impair if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the Superintendent of Streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment. Under the statutes of New Jersey any telephone company was authorized to use the public roads and highways on the line of its route, for the purpose of erecting poles thereon to suspend its wires and other fixtures,

upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in any incorporated cities and towns of the state should be subject to such regulations and restrictions as might be imposed by the corporate authorities of said cities and towns. The authorities of the township of Summit passed an ordinance that no wire should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township, the Court held that this ordinance was not a "regulation or restriction" under the statute and was therefore, invalid, saying: "A right to prevent the use of the streets for suspending wires, unless previous consent is obtained, if such right be lawfully conferred, authorizes a refusal to consent at discretion and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise." (*Township of Summit vs. N. Y. & N. J. Tel. Co.*, 57 N. J. Equity, 123.) A charter was granted to a gas company by the legislature of Georgia, in which it was authorized to use the streets of the City of Atlanta, for laying its pipes and fixtures therein, with the proviso "that the public thoroughfares shall at no time be unnecessarily interrupted or impeded by the laying down or erection thereof, and that said streets shall not be thereby injured, but shall be left in as good state and condition as they were before the laying down of said pipes." The City of Atlanta having passed an ordinance requiring any person who desired to excavate any street for the purpose of laying gas

pipes, or for any other purpose, to procure a written permission therefor from the City Engineer, under the penalty of fine and imprisonment, the gas company obtained an injunction against any interference with it on the part of the city authorities in laying the pipes in the streets, and the same was affirmed on appeal, the Supreme Court saying: "The permission of the City of Atlanta was not required to enable the complainant to exercise its franchise. It certainly was not made a condition by its charter. This was not the contract into which it entered with the state, and it would appear anomalous if a subordinate power could impose terms which the superior did not see proper to impose." (*City of Atlanta vs. The Gate City Gaslight Co.*, 71 Ga. 106.) The same principle has been followed elsewhere. (*Michigan Telephone Company vs. City of Benton Harbor*, 121 Mich. 512; *Wisconsin Telephone Company vs. City of Oshkosh*, 62 Wis. 32; *Appeal of the City of Pittsburg*, 115 Pa. 4; *Borrough of Millvale vs. Evergreen Railway Co.*, 131 Pa. 1; *Harrisburg City R. R. Co. vs. City of Harrisburg*, 149 Pa. 465; *State vs. Flad*, 23 Mo. App. 185; *Hodges vs. Telegraph Co.*, 72 Miss. 910.) In *Borrough of Millvale vs. Evergreen Railway Co., supra*, the court said: "The power of the defendant in the exercise of its franchise is altogether independent of the Borrough, and is of just as high and authoritative origin as the right of the Burrough to exist at all. The rights of both are derived from the same source, to-wit: the legislative power of the commonwealth, and the company is not subject to the slightest obligation to go to the Borrough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the Borrough council, and cannot be sanctioned for a moment."

The ordinance in question is not an exercise of the police power, nor can it be justified under that authority. The exercise by a municipality of the police power over its streets is limited to the protection of the pub-

lic in their use of the street and does not include a limitation upon their use for any legitimate purpose. The highways of a state, including the streets in its cities, are under the control of the people of the state, and in this state the people have declared in their constitution that the streets of a city may be used for laying pipes therein for supplying its inhabitants with gaslight. Under the provision that the work shall be done "under the direction of the Superintendent of Streets, ample protection is afforded to the inhabitants of the city against any unnecessary encroachment or hindrance in their use of the streets.

The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the constitution, or authorize the municipality to prevent it from enjoying that right. Even though the pipes when laid may be available for other purposes than supplying gaslight, the corporation is not thereby deprived of the right which the constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is to be supplied solely for such use."

The full scope and effect of the foregoing provision of the Constitution of the State of California is thus given effect by the decision of the Supreme Court of California. But if the City of Los Angeles has within itself a power to prescribe a district in which it shall be unlawful to erect gas works, it has it within its power to so continue to limit that district until it shall say that within the City of Los Angeles there shall be no works erected or maintained for the manufacture of gas, and thus in effect nullify the grant given by the Constitution that a person should have the right to use the streets for supplying gas by destroying the implied right that follows therefrom to manufacture gas

for the purpose of supplying the inhabitants of the municipality with the same.

If the City of Los Angeles has the power by thus prescribing the limits of a district in which no works shall be erected for the manufacture of gas, it must follow that other municipal corporations within the County of Los Angeles can do likewise, and also the Board of Supervisors, and thus make it impossible for any person to erect gas works within the County of Los Angeles, notwithstanding those provisions of the Constitution of the State of California in reference to the use of the streets for the purpose of laying pipes therein. This cannot be done.

As was said in the case of *ex parte Johnston, supra,* "When the sovereign authority of a State either in its Constitution or through its legislature has created a right, and expressed and defined the conditions under which it may be enjoyed, it is not within the providence of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens as a condition to its exercise * * * and the right to annex one condition to the exercise of the privilege implies a right to annex others which may at least impair, if not in fact amount to a denial of its exercise. The right to make restrictions must be held to be restrictions in the nature of regulations and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the right."

It would be useless to have the right to lay pipes in the street without the power to erect works for the manufacture of gas with which, through such pipes, to supply the inhabitants of the city therewith. The use of the streets would only be an exercise of a part of a corporate franchise and as was said in the case of *Millvale vs. Evergreen Railroad Company, supra,* "Any other doctrine would subordinate the corporate franchise of the defendant to the will of the borrough council, and cannot be sanctioned for a moment."

The use of the streets is but an incident to the right to manufacture and distribute gas, and it cannot be said that the incident shall be greater than the whole. It is only a part of the entire enterprise which must have been contemplated by the framers of the Constitution of the State of California.

We present this question to the consideration of this Court because we believe that under the provisions of the Constitution, Section 19 of Article XI, there is an implied power granted to every person; an implied franchise constitutionally given to every person to erect gas works within cities in California and to construct and maintain them.

The power of introducing into and supplying the city with gas carries with it the implied power to construct within the city—not in some outlying district which cannot be connected with it—gas works for that purpose. Without this right the provisions of the Constitution of the State of California as to supplying gas are rendered absolutely nugatory; for as the provision does not apply except to cities or like municipalities the attempt to exclude gas works from such cities destroys the right to supply gas under the constitutional franchise and of using the streets to supply the city and its inhabitants with gas.

Before concluding the discussion of this point we desire to direct the attention of this Court to the sweeping and prohibitory character of this ordinance in its attempted effect upon the right of citizens to make and store gas for useful purposes. The ordinance does not regulate the manner in which gas is to be manufactured, nor does it direct the method in which gas shall be stored, nor limit the amount of gas which shall be made or stored, but under its terms the making and storage of gas, except within the favored boundaries, must be absolutely stopped. The resident in the sparsely settled districts of the city, remote from

the gas mains of the Los Angeles Lighting Company, is debarred from illuminating his house by means of any of the numerous gas-making machines which have been safely used for years, and which are now in use in many residences in the City of Los Angeles.

2. We contend next that the ordinance is void in that it is unreasonable because it does not describe the district by any geographical or natural boundary or by any reasonable designation.

It goes to the reasonableness of this ordinance that it describes the district by irregular and arbitrary boundaries for the sole purpose of protecting certain interests that are already established within said boundaries—those operated by the Los Angeles Lighting Company. By an examination of the ordinance of August 26th, 1901, it will be observed that the boundary lines are drawn without any regard to any natural or geographical lines. While the eastern boundary line was the Los Angeles river and the southern boundary line the city limits of the City of Los Angeles, the western boundary line was an irregular line running through the line of Santa Fe avenue to the center line of Violet street; thence west along the center line of Violet street to the center line of Wilson street; then north along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence

easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street. This western boundary was an irregular line, and as we claim, was laid out and designated for the purpose of protecting the existing works of the Los Angeles Lighting Company.

If the ordinance is unreasonable it is invalid, as we have already shown.

3. This ordinance is invalid because it is an attempt on the part of the City Council of the City of Los Angeles to define and make that a nuisance which is not a nuisance per se.

It is our contention that it is not within the power of the City of Los Angeles to adopt any ordinance which will make a nuisance of that which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that character; and that the City Council may not by a mere resolution or motion declare a particular thing a nuisance which has not been theretofore pronounced such by law or so adjudged by judicial determination.

The ordinances in question make it unlawful to erect or maintain any works for the manufacture of gas. In the erection of a gas works there certainly cannot be created a nuisance, and it cannot be determined by the mere passage of an ordinance that the maintenance of a gas works will be a nuisance. The allegations of the bill and petition in these cases are that in its maintenance it will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the district in which it is located, or of the City of Los Angeles.

We contend that this ordinance is too sweeping and too broad and that there is nothing in the law or in the charter provisions of the City of Los Angeles or in the Constitution of this State that authorized the City of Los Angeles to pass an ordinance which makes that a nuisance which is not a nuisance *per se;* that in the erection of gas works in itself there is no nuisance, and we assert that the courts have decided in many cases that the mere designation of the legislative body that a certain thing is a nuisance which is not a nuisance or which the courts have not determined to be a nuisance does not make it a nuisance, and the legislative act is in that respect always subject to judicial scrutiny and revision.

This Court, in the case of *Yates v. Milwaukee,* 10 Wall. 497, said:

"The act of the Wisconsin Legislature, approved March 31st, 1854, confers upon the City of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee rivers, and restrain and prevent encroachments upon said rivers and obstructions thereto, and it is said by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the City Council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city, declaring the

wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

The same doctrine is laid down in the *C. R. I & P. R. R. v. Joliet*, 79 Ill. 25, 44; *Everett v. Council Bluffs*, 46 Iowa, 66.

The case of the *City of Denver v. Mullen*, (Colo.) 3 Pacific Rep. 693, was an action brought against the City of Denver for an injunction to restrain it from interfering with the flow of the water in the Platt and Denver ditch. The basis of authority for the action of the city in the premises was made to rest upon certain provisions of the city charter and certain ordinances authorizing the city "to make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same."

The Supreme Court of Colorado in deciding this case said:

"The proper construction of this language is that the city is clothed with authority to declare by general ordinance what shall constitute a nuisance; that is to say, the city may by such ordinance define, classify and enact what things or classes of things and under what conditions and circumstances such specified things, are to constitute and be deemed, nuisances. For instance, the city might under such authority, declare by ordinance that slaughter-houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the City Council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial de-

termination. *Everett v. Council Bluffs*, 46 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 497. * * *

"It is only certain kinds of nuisances that may be removed or abated by the acts of individuals or by the public, such as those which affect the health or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency. Such clear cases of nuisances *per se* are well understood, and need not be further noticed here, to distinguish them from the cases before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se*. It was constructed for a necessary, useful, and lawful purpose, was used for such purpose and therefore in its nature was not a nuisance, as a matter of law. Nor, as a matter of fact, was it a nuisance while it was no hurt, detriment, or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about, neither by the ditch itself nor its use."

In *ex parte Sing Lee*, 96 Cal. 354, it appears that the petitioner had been arrested for violating an ordinance making it unlawful to establish, maintain and carry on the business of a public laundry, without first having obtained the permit of the Board of Trustees. Of this ordinance the Supreme Court of California said:

"It is provided by Sec. 11 of Article XI of the Constitution of this State, that 'any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws,' and it is argued here, in behalf of the respondent, that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the Constitution. The power conferred upon cities and towns by the section just quoted is undoubtedly a very broad and comprehensive one, and would sustain the enactment of any ordinance having

a reasonable tendency to promote the health, the comfort, safety and welfare of the inhabitants of the municipality, and which would not be in conflict with some general law of the State. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

"The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity. * * *"

The case of the *County of Los Angeles v. The Hollywood Cemetery Association*, 124 Cal. 344, was a bill for an injunction to restrain the defendant from establishing a cemetery upon certain lands, in violation of the ordinance prohibiting the location or establishing of a cemetery within the limits of the County of Los Angeles without permission of the Board of Supervisors. It was held in that case that the ordinance was not a reasonable exercise of the police power and that it was not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom, as a business enterprise.

Grossman v. Oakland, 30 Oregon, 478.
Stockton Laundry Case, 31 Fed. 680.
In re Hong Wah, 82 Fed. Rep. 623, 624-626.
Ex parte Whitall, 98 Cal. 73.
Wood on Nuisances, Sec. 744.

The Charter of the City of Los Angeles gives the right to designate what are nuisances and to abate them, but we say that a power *to abate* does not include the power *to prevent*. That the power to abate may some times include the power to prevent must be conceded, but it is only in those cases where a thing sought to be prevented is a nuisance

per se, and those things which only become a nuisance because of the method of their operation cannot be prevented and stopped under the power simply to abate until it has been demonstrated that they are nuisances.

This point was decided by the Supreme Court of the State of Illinois in the case of *Lakeview v. Letz*, 44 Ill. 81-83, where the Court said:

"Various powers for municipal government were conferred upon them, and among others the power 'to abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof.' * * * * The act of the legislature authorizing the board of trustees 'to abate and remove nuisances,' gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power to 'abate and remove' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things which in their nature are nuisances in themselves, and necessarily so. There are some things which in their natures are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is therefore impossible to hold, that a cemetery anywhere within the limits of the town, must necessarily be a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscape garden, and as free from all reasonable objection. The power to prohibit the establishment of cemeteries except by the authority of the trustees cannot be considered as falling within the power to abate and remove nuisances."

Enough has been said to show that this ordinance of August 26th, 1901, is unreasonable and too sweeping. It is unreasonable and too broad from the fact that it attempts to say that it is unlawful to erect gas works when it is shown that the gas works can be maintained in a most satisfactory condition, not only to the public authorities, but to all the surrounding inhabitants.

If the ordinance is in violation of the rights of the petitioners to engage in a lawful occupation; if the ordinance is unreasonable in the description of the district in which it is sought to limit the right to conduct gas works within the City of Los Angeles; if it is unreasonable on any other ground; if it is intended in its operation for the purpose of protecting only certain gas works and destroying all others; if it is beyond the power of the City Council to declare that a nuisance which is not a nuisance, then this ordinance of August 26th, 1902, is invalid and violates the rights, privileges and immunities of these plaintiffs in error.

And if this Court should hold that the ordinance of August 26th, 1901, is invalid, then it must follow that the ordinance of March 3rd, 1902, which is an amendment to it, must also be invalid and void and it will be so declared by this Court.

It is not necessary for this Court to consider specifically the ordinance number 6779, attempted to be adopted by the City Council of the City of Los Angeles, November 25th, 1901, as an amendment to section one of the ordinance of August 26th, 1901, for the reason that an examination of that ordinance will disclose that the designated boundaries therein mentioned do not describe a district. The boundaries are not tied together, and the gap in the description of over one thousand feet of itself rendering the ordinance invalid for indefiniteness. Recognizing this fact, the City

Council of the City of Los Angeles adopted the ordinance number 7029 of March 3rd, 1902, the effect of which was to repeal the ordinance of November 25th, 1901, attempting to cover the same subject matter.

The ordinances are on the same subject matter. The latter covers the whole subject matter of the earlier ordinance, and while not purporting to amend, it plainly shows that it was intended as a substitute for the earlier act. "Such an ordinance will repeal the former ordinance covering the same subject."

23 Am. & Eng. Encyclopedia of Law, 485.

SECOND: IF THIS COURT HOWEVER SHOULD HOLD THAT THE ORDINANCE OF AUGUST 26TH, 1901, IS A VALID ORDINANCE, THEN WE CONTEND THAT THE ORDINANCE OF MARCH 3, 1902, IS INVALID FOR THE REASON THAT IT IS IN VIOLATION OF THE VESTED RIGHTS ACQUIRED BY THE PLAINTIFF IN ERROR, CAROLINE W. DOBBINS, BY VIRTUE OF HER PURCHASE OF LAND WITHIN THE LIMITS OF THE DISTRICT WITHIN WHICH IT WAS LAWFUL TO ERECT GAS WORKS BY THE TERMS OF THE ORDINANCE OF AUGUST 26TH, 1901, AND BY VIRTUE OF THE PERMIT GRANTED TO HER BY THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF LOS ANGELES ON THE 22ND DAY OF NOVEMBER, 1901, UNDER THE EXISTING BUILDING AND FIRE ORDINANCE.

There has been no dispute or controversy, and can be none, between the counsel for the plaintiffs in error and the counsel for the City of Los Angles as to the fact that Mrs. Dobbins acquired vested rights by virtue of her purchase under legislative authority, on the 28th day of September,

1901, of the land within the district described in the ordinance of August 26th, 1901, in which it was lawful to erect gas works; by the permit that she received from the Board of Fire Commissioners on the 22nd day of November, 1901; by the acceptance of that permit and the expenditure by her thereunder of large sums of money prior to the passage of the ordinance of March 3rd, 1902.

It is not necessary in the statement of our case to set forth and enlarge upon what we consider to be the vested rights of the plaintiff in error, Mrs. Dobbins.

It is sufficient, however, for the purpose of this argument, to say that all the acts of the said plaintiff in error were with a view of abiding by and conforming to the terms of the ordinances existing in the City of Los Angeles prior to the 3rd day of March, 1902.

It is true that the gas works had not been completed at the time of filing the complaint herein, and that it was necessary to continue the work thereon for three to four weeks longer in order to complete them, but there is no difference in law between executory and executed contracts so far as the power of the city to pass any law impairing their obligations. The rights acquired by Mrs. Dobbins were vested rights, privileges and immunities and having been by her lawfully obtained, accepted and acted under, they are vested rights and are as inviolable as any rights of property whatever.

In defining what is a vested right, Mr. Justice Chase in the case of *Calder v. Bull*, 3 Dall 394, has said: "When I say that a right is vested in a citizen I mean that he has the power to do certain actions or possess certain things according to the law of the land."

As has been well said "everything which may pass under the form of an enactment is not to be considered the law of

the land" and we contend that the ordinance of March 3rd, 1902, is not "the law of the land."

In the case of *Farrington v. Tennessee*, 95 U. S. 679, Mr. Justice Swayne, delivering the opinion of the court said:

"A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowmen. They are the springs of business, trade and commerce. * * * *

"The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that 'no State shall * * * pass any * * * laws impairing the obligation of contracts.' Art. 1, Sec. 10. This limitation no member of the Union can overpass. It is one of the most important functions of this tribunal to apply and enforce it upon all proper occasions. * * *

"Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat. 518. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans v. Van Microp*, 3 Burr. 1663; *Fourth v. Stanton*, 1 Saund. 210, note 2, and the cases there cited.

"The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. Von Hoffman v. City of Quincy, 4 Wall. 535.

"The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: 'It is a principle of that law, as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect. *Nova constitutio futuris forman imponere debet et non preteritis.* Bracton, lib. 228; 2 Inst. 292. *Dash v. Van Kleeck,* 7 Johns. (N. Y.) 447. See also *Society, Etc., v. Wheeler et al,* 2 Gall. 105, and Broom's Legal Maxims, 34."

See also *Steamship Co. v. Joliff,* 2 Wall. 457.

Worth v. Cranson, 98 U. S. 118.

Classen v. Chesapeake Guano Co., (Md.) 31 Atla. Rep. 808.

Roberts v. Brooks, 71 Fed. Rep. 914.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.

Lewis v. City of Newton, 75 Fed. Rep. 884.

Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.

City Railway Company v. Citizens Street Railway Co., 166 U. S. 562.

Sufficient has been said in this case to show that the plaintiff in error, Mrs. Dobbins, had vested rights in the premises at the time of the adoption and passage of the ordinance of March 3rd, 1902.

The ordinance is void as depriving the plaintiff in error, Caroline W. Dobbins, of property without due process of law.

The plaintiff in error, Caroline W. Dobbins, did not acquire by the permit from the Fire Commissioners, an exclusive privilege; nor did she by the purchase of the real property, acquired by her within the district by which it was made lawful under the ordinance of August 26th, 1901,

to operate a gas works within the district described in the ordinance. But she having acquired that property and having secured the permit from the Fire Commissioners, to take from her that property and the right of using it, and enjoying it for all the purposes for which it was capable, was depriving her of the property without due process of law within the meaning of the Constitution of the State of California and of the Constitution of the United States by taking away one of the incidents of its ownershrip, the right to use it and the right thereon to pursue an honest business, which business in itself was lawful and recognized as such by the laws of the State of California. To impose proper restrictions upon the property in a proper exercise of the police power is one thing, but to absolutely prevent the use of the property for the purposes for which the said plaintiff in error had purchased it, was to deprive her of her property without due process of law.

The case of the *City of Chicago v. Netcher*, 183 Ill. 104, was an action by the City of Chicago against Charles Netcher for a violation of an ordinance which was directed against the class of stores known as "department stores" or general stores for the sale of different kinds of merchandise divided into separate departments, in the City of Chicago. In reference to the ordinance involved in this case, the Supreme Court of Illinois said:

"The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined, and uniformly upheld. These constitutions insure to every person, liberty and the protection of his property rights, and provide that he shall not be deprived of life, liberty or property without due

process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it, It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitutions as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hinderance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so. *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62; Cooley, Const. Lim. 393."

But it will be contended on behalf of the defendant in error, that though said plaintiff in error had acquired vested rights, yet those vested rights are subject to *police regulations* and the *police power* of the State. It is contended therefore by defendant in error that this ordinance is a police regulation.

The Ordinance of March 3, 1902, is not a proper execution of the police power.

Should it be decided that it was within the power of the City Council to adopt the ordinance of August 26th, 1901, this question is as we take it one that deserves this Court's

gravest consideration, namely, whether or not the ordinance of March 3rd, 1902, is a proper police regulation.

It is our contention that this ordinance is not a police regulation and does not come within the power of the City of Los Angeles in reference to police regulations; that it is not within the police regulations as defined and recognized, and not within the sovereign police power of the State itself; and that therefore it is in violation of the vested rights acquired by plaintiff in error, Caroline W. Dobbins.

In discussing this question as to the police power of the State, where the vested rights are involved, and as to the duty and power of this Court, we desire to call the attention of this Court to the expression that is used by the Supreme Court of the State of New York in the case of *People v. Budd*, 117 N. Y. 1, where the Court said:

"The generality of terms employed by jurists and publicists in defining the power, while they show its breadth in and the universality of its presence, nevertheless leaves its boundaries and limitations indefinite, and impose upon the Court the necessity, as each case arises, to determine whether the particular statute falls within or outside of its appropriate limits."

So it is for this Court to determine as an independent question whether this particular ordinance belongs or does not belong within the police power and whether or not it interferes with the vested rights which we have acquired.

Mr. Justice Brannon, in his work on the Fourteenth Amendment, the most recent work in reference to this important article of the Federal Constitution, p. 172, says:

"In *Lawton v. Steele*, 152 U. S. 133, is an opinion by Mr. Justice Brown which I consider one of the very best statements of the nature and extent of the police power to be found anywhere. Mr. Justice Brown says: "It is universally conceded to include everything essential to public safety, health and morals, and to justify destruction or

abatement by summary proceedings of whatever may be regarded as public nuisances. * * * * * * * 'To justify the State in thus interposing its authority in behalf of the public it must appear, *first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts.'"

This ordinance is not within the provisions of the police power as we understand it. We understand the police power, as defined, to have reference to *those things which affect the public health, the public safety, the public comfort or the public morals.* If they do not affect those things they are arbitrary exercises of the legislative power and if they affect vested rights the courts will not sustain them.

In the case of *Noel v. People*, 187 Ill. 587, the Supreme Court of Illinois said: "Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. *City of Chicago v. Netcher*, 183 Ill. 104. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid."

In that case the Supreme Court of Illinois quoted with approval from the case of *State v. Donaldson*, 41 Minn. 74, where the Supreme Court of Minnesota said:

"In the absence of some other regulations, a statute merely limiting the sale of patent medicines to a particular class

would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of this State. * * * A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health, it must be a health law having some relation to public health.* * * If it is apparent on the face of the act that its provisions, from the very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power, and an arbitrary and unwarranted inteference with the right of the citizen to pursue any lawful occupation."

In *Chicago v. Netcher, supra*, the Supreme Court of Illinois further said: "In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. *Braceville Coal Co. v. People, supra; Eden v. People*, 161 Ill. 296, 43 N. E. 1108; Cooley, Const. Lim. 577. It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended

that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them, nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In *Meyers v. Baker*, 120 Ill., 567, 12 N. E. 79, the act prohibiting the establishment of a tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case."

The police power of the State of California is a sovereign power. It does not exist by virtue of the grant of the constitution of that State. The provisions of the constitution of that State in reference thereto are not a grant of the police power. The police power, like the power of eminent domain and the power of taxation is a sovereign power within the people of the State prior to the adoption of the constitution. Sec. 11 of Art. XI of the constitution of the State of California is not, therefore, a grant of police power but it is an extension to the counties, cities, towns or townships of

the State of the right to exercise the powers that are inherent in the legislature as the representative of the people. That is the scope of Section 11 of Article XI of the constitution of that State. It is therein provided "that any county, city, town or township may make or enforce within its limits all such local police, sanitary or other regulations as are not in conflict with general laws." The provisions of that constitution are simply a grant to the municipal authorities to exercise a power which is inherent in the State. It does not enlarge upon that power or give the municipality any power which the legislature itself did not have; namely a right to exercise the police power by virtue of its sovereignty; and the police power is not enlarged by virtue of the terms of the provisions of that constitution. It is as it always was, the right of the people to legislate in reference to those things which promote the public health, the public comfort, the public safety or the public morals.

It was not intended by either the constitution of that State, or any statute passed prior to its adoption, to vest in the City of Los Angeles police powers in excess of those which states or municipalities exercised prior to the adoption of the constitution of the State of California, and it cannot be successfully asserted that the City of Los Angeles has to-day any police power which is superior to and more far-reaching than that which the common law recognizes as inherent in states and as possessed by municipalities to whom that police power upon certain subjects had been delegated.

Ex parte Campbell, 74 Cal. 20;
Ex parte Roach, 104 Cal. 272.

The following authorities clearly define the police power and are applicable to the case at bar, and distinguish the case at bar from the authorities relied upon by the defendant in error in the court below.

The case of the *City of Indianapolis v. Consumers' Gas Trust Company*, 140 Ind. 107, was prosecuted by the City of Indianapolis against the Consumers' Gas Trust Company for the violation of a city ordinance. By the general ordinance passed by the City of Indianapolis on the 27th day of June, 1887, it was provided that any corporation could maintain, lay or extend and maintain mains, pipes, etc., through the streets, etc., of said city, and may take up for the purpose of altering, changing or repairing the same, as the necessities of the case may require, for the purpose of supplying such city and its inhabitants with natural gas under certain restrictions and conditions prescribed in the ordinance. Afterwards, in 1890, the City Council of the City of Indianapolis passed an ordinance making it unlawful for any person, firm or corporation to cut or dig into any street or alley that may theretofore have been paved with brick, or any form of block, macadam or asphaltic pavement, until such person, firm or corporation, for whose benefit such proposed opening was to be made, should have first secured the consent of the common council and board of aldermen so to do, and should have filed in the office of the city a bond conditioned to protect the city from all liability on account of the proposed opening of said street. For the alleged violation of this city ordinance the prosecutions were commenced against the defendant and it was contended that the defendant having complied in all respects with the provisions of the ordinance of June, 1887, that the ordinance of 1890 was invalid in that it impaired the obligation of the legislative contract between appellant and appellee by virtue of the ordinance of 1887. It was contended by the city, that nothwithstanding the passage of the first ordinance and the acceptance thereof by the Gas Company constituted a contract, yet it was subject to the exercise of the police power upon the part of the city, which power could

not be bargained away, and that the ordinance of 1890 was a valid exercise of that power. In reference to this ordinance and this question, the Supreme Court of Indiana, said:

"There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Gas & Min. Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624. It was not limited alone to the granting of the franchise, but it had the right to prescribe and impose terms and conditions. Dill Mun. Corp. Sec. 706; 2 Wood, Ry. Law, p. 986. Elliott Roads, & S., p. 465. When these terms and conditions proposed by appellant were accepted by the appellee, and complied with, it became a binding contract. *Western P. & S. Co. v. Citizens' St. R. Co.*, 128 Ind. 531, 26 N. E. 188, and 28 N. E. 88. But the appellant contends that such grants are but the exercise of police power, and may be changed or repealed by the granting power. It is true, that, in grants to persons or corporations to supply gas and the like to the inhabitants of towns or cities, the municipality does not part with or bargain away its right, under the police power, to protect the public health, the public morals, and public safety, as the one or the other may be affected by the exercise of the franchise by the grantee. *New Orleans Gaslight Co. v. Louisiana etc., Manuf'g. Co.*, 115 U. S. 650, Beach Pub. Corp., Secs. 713, 990, 1229, 1230. In the case of the *City of Indianapolis v. Indianapolis Gaslight & Coke Co., supra*, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets. But this court, in that case, draw the distinction between the legislative and contractual powers of municipal bodies as follows: 'These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that, when the City of Indianapolis made the contract in question with

the gas light company, it made it in the exercise of its power to contract, and not in the exercise of its powers to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power.' See, also *Insurance Co. v. Debolt*, 16 How. 416. The appellant cites *Stone v. Mississippi*, 101 U. S. 814, in support of its contention that the grant to appellee to use the streets was the exercise of its police power; but this case decides only that the abolition of a lottery was clearly within this power, as lotteries are contrary to public morals. The case has no bearing upon the rules which the appellant insists ought to be applied in the case now before us. Chief Justice Waite, in this case, speaking for the court, on page 818 of the opinion, said: 'Many attempts have been made in this court and elesewhere to define the police power, but never with success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals.' This, we think enunciates the true rule. We cannot agree, and hold with the appellant that the second ordinance upon which this prosecution is based should be regarded as an exercise of the police power under discussion, so as to bind the appellee, under the facts alleged in his answer, and thereby compel it to comply with its terms and conditions in the exercise of the rights granted to it by the first ordinance."

The case of *Barthet v. City of New Orleans*, 24 Fed.

Rep. 564, is also directly in point, and in this case the City of New Orleans attempted to do what the City of Los Angeles is now attempting to do, in having once established a district, they attempted to restrict it. It appeared in this case that by several ordinances adopted, the City of New Orleans designated the place at which the slaughtering of cattle might be carried on, and prescribed in detail the regulations under which said business could be conducted. The complainant, a citizen of France, whose trade and business was the slaughtering of cattle for food, desiring and intending to engage in such business in New Orelans, leased, with the privilege of buying, two squares of land situate within the limits prescribed by the city ordinance, and proceeded to repair such buildings and construct on said ground other buildings and improvements suitable for the trade in which he is engaged, investing in said improvements a considerable sum of money. Subsequently, on May 19th, an ordinance was passed by the Council which is styled "An ordinance amending ordinance 7,336, as passed September 13, 1881, designating the places for slaughtering animals intended for food under article 248 of the constitution." The original ordinance provided that "It shall be lawful for any person or corporation to keep and maintain slaughter houses, etc., within certain limits, under certain regulations." The amendment mentioned made it unlawful to keep and maintain slaughter houses within said limits prescribed in the original ordinance and under said regulation "except permission be granted by the Council of the City of New Orleans." The court said:

"It appears that defendant corporation intends actively to enforce, or attempt to enforce, as against Barthet, the amended ordinance; that it is about to obstruct, hinder, and prevent him from carrying on his legal business in the limits already laid out in pursuance of article 248.

"The complainant, alleging that, acting on the good faith of said articles and ordinances, he has acquired vested rights, and that the ordinance of May 19th is unconstitutional, brings a bill for injunction to enjoin and restrain the defendant from interfering in any manner with him in carrying on his business. * * * * *

"If the amendment of May 19th becomes operative as a law, the investment made by Barthet, on the faith of the law existing when he erected his buildings, will be lost or greatly diminished in value and his privilege, which is of more value, may be wholly destroyed by refusal of the city. It is urged in argument that the corporation is a legislative body, endowed with police powers, to be exercised with absolute discretion; that this court has no power to control or limit its action in directing when, and upon what particular lot in the territory laid out and defined by the city, Barthet, or any other person following the same business, may locate and carry on his business of slaughtering animals for food. The proposition of the city attorney, in view of the many cases that have been decided by the State and Federal courts, in which just such assumption of power have been contended for and denied to municipal authorities, need not now be considered, further than to say that the court does not think the proposition maintainable under the law and facts found on the hearing of this bill."

"Our opinion will be better understood when we say that the city authorities have no power, legislative, judicial, or administrative, to pass the ordinance complained of; because the power, by whatever name it may be called, delegated to the city in articles 248, 258, as far as Barthet is now concerned, was exhausted when the city officials laid out the limits in which it was declared lawful to slaughter animals for food."

The case of the *City of Buffalo v. Chadeayne*, 124 N. Y. 163, is a case where the City of Buffalo, having prescribed certain fire limits and having given permit to a citizen of Buffalo to erect seven frame buildings within that district, subsequently after he had his foundations laid, changed the

district and prosecuted him for a violation of the ordinance by which they attempted to restrict the district. In that respect it is similar to the case at bar. The court said:

"This action was brought to recover a penalty for an alleged violation of an ordinance pertaining to the erection of wooden buildings within the prescribed fire limits of the City of Buffalo. On the 11th day of July, 1887, the Common Council of the city passed a resolution granting permission to the defendant to erect seven frame wooden houses upon premises owned by him, and specifically described. The resolution was duly approved by the mayor, and thereupon, the defendant entered into a contract for the materials with which to make such structures. He made excavations for the cellars, and laid a portion of the walls prior to the 1st day of August. On that day the Common Council, without notice to him, passed a resolution which it is claimed rescinds the former resolution. The last resolution was approved by the mayor on the 15th day of August, and on the 10th day of November a copy thereof was served upon the defendant. Oral notice was given to him of the passage of the resolution on the 2nd day of August, prior to its approval by the mayor. He, however, continued the construction of his buildings, and at the time the notice, with a copy of the resolution, was served upon him in November, several of the buildings had their roofs on, and the rest were in the process of construction. This action was then brought for the penalty provided for in the ordinance, and resulted in the judgment which is the subject of this review. The charter of the plaintiff (chapter 519, Laws 1870) provides that 'the city shall have power by its Common Council from time to time to enact ordinances, * * * to prescribe the limits within which wooden buildings shall be erected, and the manner in and material of which all buildings shall be constructed within such limits. Every building erected or placed contrary to any ordinance passed under the last above provision shall be deemed a common nuisance, and may be abated as such.' Title 3, Sec. 8, Subd. 4. Pursuant to this provision, the Common Council enacted ordinances, among which we find the following: 'No per-

son shall, without permission of the Common Council, erect, place, or move any building, constructed in whole or in part of wood, within the limits of the City of Buffalo, as defined by Section 2 of Title 1 of the charter said city.' Ord. c. 5, Sec. 20. The defendant's buildings are within the fire limits, as prescribed by the ordinance. He therefore had no right to construct them without permission of the Common Council. Such permission, as we have seen, was granted on the 11th day of July, 1887, and thereby he acquired the right to proceed with the construction of his buildings, and to possess and enjoy the comforts they might afford. As soon as he had entered upon the construction of the buildings, and incurred liabilities for the work and material, he had a property interest in them. In this right he was entitled to protection. *People v. O'Brien*, 111 N. Y. 1-62, 18 N. E. Rep. 692; *In re Union El. R. of Brooklyn*, 112 N. Y. 61-75, 19 N. E. Rep. 664; *People v. Otis*, 90 N. Y. 48-52; *Stuart v. Palmer*, 74 N. Y. 183; *Detroit v. Plank-Road Co.*, 43 Mich. 140, 5 N. W. Rep. 275.

"It is claimed by the appellant that a municipal board may reconsider its action at any time before private vested rights have resulted from such action, and that the defendant could not acquire vested rights as against the police power of the state or municipality. For the purposes of this case we may concede these propositions. As to the first, it appears, as we have seen, that the defendant had entered upon the construction of his buildings, had made contracts, and incurred liabilities thereon, before the Common Council attempted to reconsider its action, giving him a permit to construct of wood. A private property right had, therefore vested in him prior to the rescission of the resolution. As to the second, his right may be subject to the police power of the State, but the difficulty is that the State has not seen fit to deprive him of such right by the exercise of such power, nor has it delegated the same to the municipality. The State has given the municipality power to prescribe the limits in which wooden buildings shall not be erected. This pertains to the future, and not to existing wooden buildings. The ordinance to which we have referred provides that no person shall, without permission of the Common Council,

erect any building in whole or in part of wood, within certain limits. This has reference to buildings that shall be erected in the future, and not existing buildings, or to those erected with the permission of the Common Council. So that neither the charter nor the ordinance authorizes it to interfere with existing buildings, or those constructed with its permission. There is consequently no power given to the Common Council to deprive the defendant of any vested property rights in the buildings. If the Common Council could interfere and rescind its permit after a building is partially constructed, it could also rescind after it was fully completed. It would consequently follow that every person who in the past has constructed wooden buildings with the permission of the Common Council is now liable to have his permit revoked, and his buildings declared a nuisance, and abated as such. The restrictions authorized by the provisions of the charter under consideration are for the purpose of the prevention and extinguishment of fires. They have no reference to buildings that may become a nuisance by reason of their becoming dangerous to the public. Having in view the purpose for which the provision was enacted, it seems to us clear that it was not intended to give to the Common Council the power to deprive persons of their buildings which had previously been erected, or of those which should be thereafter erected, in whole or in part, with the permission of the Common Council; and that its power is limited to the prevention of the erection of wooden buildings in the future without its permit."

This is the latest case in the Court of Appeals of New York having reference to this subject.

It is of vital importance in arriving at a conclusion in this case to bear in mind that the police power has only to do with those things that affect the public health, the public morals, the public comfort or the public safety. This is demonstrated and insisted upon by this Court as the real criterion of all these questions as to the exercise of the police powers.

The cases relied upon by the counsel for the defendant

in the court below, as for instance the case of *Beer Company v. Massachusetts*, 97 U. S. 25, a beer case; *Fertilizing Company v. Hyde Park*, 97 U. S. 659, a fertilizing case; and *Stone v. Mississippi*, 101 U. S. 814, a lottery case, are all well recognized as being within the police power. This case of the *Hyde Park Fertilizing Company*, as we have before said, is one of the strongest cases reported, where permission was given by a charter granted by the legislature of the State of Illinois, to the fertilizing company to erect fertilizing works within the town of Hyde Park. Subsequently, the growth of the city of Chicago was such that these works became a nuisance and the city authorities of the town of Hyde Park passed an ordinance absolutely prohibiting carrying on the manufacturing of fertilizers and rendering business within the town of Hyde Park, although this work had been caried on by this company for ten years by virtue of the charter of the legislature, and they had expended upon their works upwards of $200,000.

This court sustained the ordinance passed by the town authorities of the town of Hyde Park because they said it came directly within the definition of the police power in that it affected the public health and the public comfort.

This case is an illustration of a well recognized principle that the great police power is not bound to recognize a condition or state of things existing to-day as beyond change at its hands in time to come, when changed conditions occur and public welfare demands alteration and increased exercise of police power in restraint of privileges once established. A business once harmless and lawful under an altered condition of things may later on become hurtful to the public, and in that event may be restrained in its transaction. That is not the case at bar.

Take, however, the case of *New Orleans Gas Company*

v. Louisiana Light Company, 115 U. S. 650, and we come to a different line of authorities and we find there the distinction well pointed out by Mr. Justice Harlan, who rendered the opinion of this Court, and which is the distinction this Court will bear in mind in determining this question and should always be borne in mind in the determination of the question whether or not an ordinance is a police regulation.

Is the object sought to be attained the abatement and destruction of that which affects the public health, the public safety or the public morals? If it does not, it is not within the police power of the State; and if it affects vested rights, it is the taking of private property without due process of law. If it interferes with the lawful occupation of a citizen, it interferes with his rights, privileges and immunities.

Mr. Justice Harlan makes this distinction in the case of *New Orleans Gas Company v. Louisiana Light Company, supra*, and notwithstanding the decisions that are known as the Kansas liquor cases, decided at a later date by this Court (*Mugler v. Kansas*, 123 U. S. 623), this Court has adhered to the doctrine laid down in *New Orleans Gas Company v. Louisiana Light Company*, and in the case of *Walla Walla v. Walla Walla Water Company*, 172 U. S. 15, has reiterated the same doctrine.

Mr. Justice Harlan in the case of *New Orleans Gas Company v. Louisiana Light Company*, in delivering the opinion of the court, used this language: "The principle upon which the decisions of *Beer Company v. Massachusetts*, (97 U. S. 25), *Fertilizing Company v. Hyde Park* (97 U. S. 659), *Stone v. Mississippi* (101 U. S. 814), and *Butchers' Union Company v. Crescent City Live-Stock Landing Company* (111 U. S. 746), rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necesary to protect the public health, or the public morals. That principle, it may be observed, was an-

nounced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

"The present case involves no such consideration. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects to whomsoever and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of public convenience and the public safety."

We strenuously contend that in the erection of these gas works that there is nothing unlawful and that when we come to maintain these works, if we maintain a nuisance the city authorities have a right under changed conditions to regulate it and make us cease maintaining a nuisance, or if we charge for gas more than we ought to, they have a right to regulate that; but they have no right to absolutely drive us out of business and say we shall not erect a building in which we are going to manufacture this gas. The erection of gas works does not constitute a public offense in any respect whatever; nor does their maintenance, unless it is judicially determined it is a nuisance.

Continuing from the *New Orleans Gas Company's* case, this court says:

"Whatever therefore in the manufacture or distribution of gas in the city of New Orelans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety. The article in the State Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many."

And so we insist that the facts that distinguish these cases whether or not they are within the police power is this: Do they affect the public health, the public safety, the public comfort or the public morals? If they do not, they are not within the proper exercise of the police power and the police regulation.

In the case of *Walla Walla City v. Walla Walla Water Company*, 172 U. S. 15, this Court said:

"The argument that the contract is void as an attempt to barter away the legislative power of the City Council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a City Council can neither bind itself nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined. If a contract be objectionable in itself upon these

grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or, may abrogate it entirely, upon the principles that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual. Thus in *Fertilizing Company v. Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might own or buy. Subsequently, the charter of the village of Hyde Park was revised, and power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates v. Mayor, &c. of New York*, 7 Cowen, 585.

"Substantially, the same ruling was made in *Butchers' Union Company v. Crescent City &c Company*, 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughter houses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughter houses.

"The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U S. 814; *Douglas v. Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Company v.*

Massachusetts, 97 U. S. 25; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and even laws regulating the inspection of coal oil; *United States v. De Witt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

"Under this power and the analogous power of taxation we should have no doubt that the City Council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, and the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

In the manufacture of gas there is nothing that will affect the public health or the public safety. It is alleged in the complaint in this case that the gas works in question are being erected upon concrete foundations with a superstructure of brick, steel and iron, of the best material procurable, and are not combustible and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins, by the use of the said devices and improvements and the said machinery

therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said Caroline W. Dobbins, or of any other of the inhabitants of said City of Los Angeles.

The demurrer of the defendant in error admits the facts thus pleaded in the complaint as true. Until we have had an opportunity of testing this question, the city authorities have no right to interfere and exercise this so-called police power.

It will be for the counsed for defendant in error to show any case in which the police power has been sustained and allowed to infringe upon vested rights, except in those cases which affected the public health, comfort, safety or welfare, and it will be for them to show that in the nature of the case that under a police power a municipal authority has been allowed to restrain the prosecution of any business or enterprise that does not so infringe upon the public health, public comfort, public welfare or public safety.

It wil not be sufficient for them to cite the case of *ex parte Laccy*, 108 Cal. 326, where an ordinance for the establishment of a steam carpet beating machine was sustained, as that was a health ordinance, and the City of Los Angeles cannot pass, under the guise of a health measure, an ordinance that has no relation whatever to the public health; the *Slaughterhouse Cases*, 16 Wallace 36, which were health regulations; the case of *Barbier v. Connolly*, 113 U. S. 27, in reference to the conduct of a public laundry between the hours of ten o'clock at night and six o'clock in the morning, which had reference to a fire regulation; or the case of *Knoxville v. Bird*, 12 Lea, 121, which had reference to fire limits ordinance and affected the public safety; or the case

of *Davenport v. City of Richmond*, 81 Virginia 636, where the ordinance in question was in reference to the keeping and selling of gun powder and affected the public safety; or lottery cases, which affect the public morals. It will be for the learned counsel for the respondent to show any case in which the police power has been allowed to infringe upon vested rights by determining that any enterprise was a nuisance unless the same was a nuisance *per se*.

The plaintiff in error, Caroline W. Dobbins, had vested rights; she had civil rights pledged by legislative authority, by permission of the City Council of the City of Los Angeles by authority of the Board of Fire Commissioners, to whom it was delegated. Under this legislative authority the said plaintiff in error has expended large sums of money in the attempt to erect these gas works. The city should be estopped by its own grants. Having once established a district and having invited the said plaintiff in error by virtue thereof to acquire certain property rights therein, the city has exhausted its powers and has no power to change the district in violation of those rights, unless it comes within some legitimate police regulation under a changed condition of affairs; and we urge and insist that the ordinance of March 3rd, 1902, does not come within what is known as the police power, but is in violation of vested rights.

THIRD: A COURT OF EQUITY HAS POWER TO RESTRAIN BY INJUNCTION A MUNICIPALITY FROM INSTITUTING CRIMINAL PROCEEDINGS WHEN SUCH PROSECUTIONS ARE THREATENED UNDER COLOR OF AN INVALID ORDINANCE FOR THE PURPOSE OF COMPELLING THE RELINQUISHMENT OF A PROPERTY RIGHT.

This question relates to the equity jurisdiction of the court.

We have demonstrated that the prosecutions instituted by the defendant in error, the City of Los Angeles, were under invalid ordinances and that the plaintiff in error, Caroline W. Dobbins, had a vested property right, acquired by legislative authority, on which she had expended large sums of money, which the defendant in error was endeavoring to coerce her into relinquishment of by prosecutions under these invalid ordinances.

It is alleged in the complaint that the defendant in error conducted these prosecutions under the guise of enforcing the invalid ordinances to which we have called this Court's attention, and that it threatened that if the said plaintiff in error continued to carry on her work in which she was engaged in building the said gas works and manufactory for the manufacture of gas, that it would arrest all persons employed and engaged in said work until it should have stopped the construction of said gas works and compelled the said plaintiff in error to desist from the erection thereof.

Under these circumstances, the remedy in equity was available and was the only complete remedy of the plaintiff in error.

While, as a general rule, equity will not interfere by injunction to restrain the prosecution of suits for violation of municipal ordinances, there are certain distinctions to be observed in applying this rule.

These distinctions and exceptions to the general rule are best illustrated by the case referred to at the opening of our brief, which was before this court at the October term, 1903, *Davis & Farnum Manufacturing Company v. City of Los Angeles*, 189 U. S. 207.

This was a bill in equity filed in the Circuit Court for the Southern District of California by appellant therein, a citizen of Massachusetts, to restrain the City of Los Angeles and its officers from enforcing certain municipal ordi-

nances, prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the city.

The gravamen of the bill was that on September 1, 1901, Caroline W. Dobbins made a contract with the Valley Gas and Fuel Company, a California corporation, to build certain gas works for her, including all things necessary for the manufacture, recovery and storage of gas, on lands thereafter to be designated; that on September 17 the appellant made a contract with the Gas and Fuel Company to erect upon Mrs. Dobbins' premises a water tank and gas holder, having a capacity of 100,000 cubic feet of gas, and that immediately thereafter it constructed and prepared the material and machinery necessary for the erection of the tank and gas holder, and shipped the same to Los Angeles; that on September 28, Mrs. Dobbins purchased certain lands in Los Angeles, which were within the limits wherein it was lawful to erect gas works as described in a municipal ordinance adopted August 26, 1901, and on November 1 applied to the board of Fire Commissioners for a permit to erect such gas works; that on November 22, her petition came on for hearing before the Fire Commissioners, and after proof had been made that all provisions of prior ordinances had been complied with, the matter was duly considered, and finally resulted, November 22, in a vote to grant a permit to erect and maintain the gas works.

That upon the 22d day of November, Mrs. Dobbins' contractors began at once to lay the foundation for said works at a cost of upwards of $2,500, when on November 25, the city adopted an ordinance, amending that of August 26, 1901, including her property in the prohibited territory for the erection or maintenance of gas works, which ordinance, however, seems to have proved defective, and subsequently in February, 1902, caused certain of the employes of the Gas and Fuel Company to be arrested, charging them with

a violation of the ordinance. Subsequently under new proceedings certain employes of the plaintiff were arrested and the work stopped.

Another ordinance was passed on March 3, 1902, also amending that of August 26, 1901, and other arrests were made of the employes for a violation of this ordinance. It was averred that the gas works are in an uncompleted condition, exposed to the elements and in danger of being destroyed, and that all of the aforesaid ordinances were adopted by the Common Council at the instigation of the Los Angeles Lighting Company, which had enjoyed a monopoly of the gas business for the last ten years.

A demurrer was filed to this bill by the city for want of equity and of jurisdiction, which was sustained by the court, and the bill dismissed. (115 Fed. Rep. 537), apparently upon the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Whereupon an appeal was taken to this Court:

Mr. Justice Brown delivered the opinion of this Court:

"The court below did not pass upon the validity of these ordinances, but came to the conclusion that a bill in equity would not lie to restrain their enforcement, and in this aspect we shall discuss the case. As the only method employed for the enforcement of these ordinances was criminal proceedings it follows that the prayer of the bill to enjoin the city from enforcing these ordinances or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character.

That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion

of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, (*In re Sawyer*, 124 U. S. 200), that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule. The plaintiff in the case of Sawyer sought to restrain the mayor and committee of a city in Nebraska from removing a city officer under charges filed against him for malfeasance in office. This was held to fall within the general rule and not within the exception.

The general rule that a Circuit Court of the United States, sitting as a court of equity, cannot stay by injunction proceedings pending in a State court to enforce the criminal laws of such State, was applied in *Harkrader v. Wadley*, (172 U. S. 148,) to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in *Fitts v. McGee*, (172 U. S. 516,) to a suit brought by the receiver of a railroad against the attorney general of the State to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the provisions of a State law reducing the tolls, which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the State to enjoin the institution of criminal proceedings, and hence within the general rule.

Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction had been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of *Regan v. Farmers' Loan & Trust Co.*, (154 U. S. 362,) in which, under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that State, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates and in the opinion a few

instances were cited where bills were sustained against officers of the State, who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. (*Springfield Spinning Co. v. Riley*, L. R. 6 Eq. 558.)"

Besides the authorities cited by this court in support of the foregoing propositions, we refer to other cases cited by us in the brief *supra*.

The fact that municipal and city regulations are usually rendered effective by making their violation punishable offenses does not militate against the jurisdiction of a court of equity to protect all property right against invasion by invalid ordinances.

This Court in the case of *Detroit v. Detroit Citizens Street Railroad Company*, 184 U. S. 368, well decided that the presence or absence of penalties for disobedience of the ordinance did not alter the principle, and confining the question before this Court to the principle, as we have stated it, that courts of equity will enjoin the enforcement of void city ordinances to prevent a multiplicity of actions or to protect property rights injuriously affected or impaired thereby, especially when they are acquired under legislative authority, gives no cause for alarm that courts of equity would be found "exercising supervisory power over the administration of a part, not inconsiderable of the criminal laws of the country."

The case made by the complaint filed herein by Caroline W. Dobbins, plaintiff in error, presents strong questions for equitable interference. The municipal authorities of

the City of Los Angeles, in violation of all the rights of Caroline W. Dobbins, plaintiff in error, passes ordinances that absolutely prohibited the erection of the work in which the said plaintiff in error and her employes were engaged and attempted to intimidate and coerce those engaged in the work to submit to their lawless exactions and stop all work in which the employes of the said plaintiff in error were engaged by arrests and threats of fine and imprisonment. The city authorities have already four times arrested the employes of the said plaintiff in error and solemnly avowed that it was their intention to keep on arresting them daily until they stopped and desisted from all work upon the enterprise in which they were engaged. We have shown that they were engaged at the time of the passage of this ordinance, in a lawful occupation.

The plaintiff in error, Caroline W. Dobbins, has no remedy against the defendant in error for damages, for in the absence of a statutory provision in the State of California imposing the liability, a municipal corporation is not liable for the misfeasance, malfeasance or non-feasance of its officers.

The defendant in error was not liable for the wrongful arrest and imprisonment by its officers of the employes of the plaintiff in error, Caroline W. Dobbins, or forcing the said plaintiff in error to desist and cease from the work of constructing the gas works. *Stedman v. San Francisco*, 63 Cal. 193; *Chope v. Eureka*, 78 Cal. 508; *Doeg v. Cook*, 126 Cal. 213.

The complainant has no speedy and adequate remedy at law and it is a fundamental principle of equity jurisprudence that a remedy at law must be as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity.

The long delays incident to the trial of actions at law

when the men are arrested, before the magistrate, on appeal, on habeas corpus and on writs of error, with work delayed, contracts unfulfilled and heavy damages incurred, and the plaintiff in error ruined, the remedy at law is not such an adequate remedy as may be had in equity where once for all, and without a multiplicity of suits, matters that affect not simply the plaintiff in error, but the interests of the entire community, involved in public utilities such as are described in this complaint, may be determined.

In the case of *Boyce's Executors v. Grundy*, 3 Peters, 377, this Court, referring to the sixteenth section of the judiciary act prohibiting suits in equity where there is a plain adequate remedy at law, said: That section was "merely declaratory on the subject of legal remedy. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In the case of *Walla Walla City v. Walla Walla Water Company*, 172 U. S. 1, 12, this Court also said: "This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215; *Ins. Co. v. Bailey*, 13 Wall. 616, 621; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Tyler v. Savage*, 143 U. S. 79, 95."

If "courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country." 2 Story, Eq. Jur., Sec. 928.

We may therefore conclude that when property rights are involved a court of equity may enjoin the enforcement of a void city ordinance to prevent a multiplicity of actions, or to protect the property rights injuriously affected or impaired thereby.

FOURTH. WHERE THE SENTENCE AND JUDGMENT OF A COURT IS BASED UPON AN ORDINANCE WHICH IS UNCONSTITUTIONAL, THE JUDGMENT AND SENTENCE OF SAID COURT IS WITHOUT AUTHORITY AND IS VOID, AND THE DEFENDANT IMPRISONED UNDER IT WILL BE DISCHARGED ON HABEAS CORPUS.

It is proper for this Court, under a writ of habeas corpus, to inquire into the validity of the law or ordinance under which a prisoner is held in custody, as affecting the jurisdiction of the Court which ordered his imprisonment.

In re Coy, 127 U. S. 731-758.

The ordinances, therefore, under which the prisoner, Martin Daly, is held in custody, being invalid, he is entitled to his discharge.

We, however, desire to call this Court's attention in this connection to the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, where this Court considered the same discrimination in the enforcement of the ordinance that is attempted in this case. It is alleged in the petition for a writ herein (Transcript Daly case, fol. 24) that the Southern Pacific Railroad is operating outside of the district in which, by said ordinance of the city of Los Angeles under which this plaintiff in error was arrested, it is lawful to erect or maintain gas works, a large, extensive works for the generation of gas; that at said works of said Southern Pacific Railroad Company are maintained and operated retorts, holders and all necessary appliances for the manufacture of gas on a large and extensive scale; and, also, the gas works of the California Fruit Canners' Association, at the corner of Macy and Anderson streets in the said city of Los Angeles, and without the limits of the alleged district defined

by said ordinance where it is unlawful to operate gas works, at which gas is manufactured and stored by the said cannery company are being operated in plain violation of the terms of the alleged ordinance upon which this prosecution is based, and that said ordinance has not been enforced against said corporations.

There can be no distinction drawn between the principles laid down in the case of *Yick Wo v. Hopkins,* and the admitted facts as disclosed by the petition of Martin Daly in this proceeding. The petition discloses, to quote from this Court in the case last referred to, that this case presents "the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration and those representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the 14th Amendment of the Constitution of the United States."

CONCLUSION.

The supreme question in this case, however, is the protection of private rights from an unwarranted and unconstitutional assumption of power by a governing municipal body. While the judiciary is the protecting power of the whole government, it is also charged with the unhampered protection of private rights. When a collision must unhappily exist between the government and private rights, private rights, as well as sovereign powers, are protected by the constitution. To this Court is wisely committed the solution as to whether the exercise of governmental

powers is unwarranted and unconstitutional and infringes upon private rights. Fortunately, it is not left to the mere fiat of a municipal council. However, members of a legislative body may pass laws in the exercise of their general discretion, they are not superior to the judiciary in the determination of the validity of such laws. This should be especially so when individuals have applied to the legislative power to interfere with private rights and private property. Such applications have in some instances met with favor and support. To give security to private rights, these interferences are subject to judicial revision, whether the motives of the legislative body are to be considered or not.

Much has been said about whether the courts will consider the motives which actuate the municipal legislative body in adopting these ordinances. The question need not be considered further. Suffice it to say that this Court will examine all the circumstances that surround the adoption of these ordinances and the object sought to be obtained thereby and will therefrom determine their reasonableness and validity and whether they are not oppressive and operate to the unlawful confiscation of private rights.

It has been demonstrated that these ordinances have no real or substantial relation to either the health, safety, comfort or welfare of the public. It is not sufficient that any business or occupation, if negligently managed or recklessly conducted will injure the public health. This will not justify a municipal legislative body in prohibiting that business or occupation from being properly conducted. If these ordinances are to be justified on the ground of public safety, the same considerations apply. Comfort and welfare are relative terms dependent on conditions and circumstances which must be made apparent—almost self-evident.

The admitted facts in these cases preclude the possibility of any justification being found for the adoption of or-

dinances so far reaching and extreme as those in question in the attempt of the municipal legislative body to interfere with the lawful use of private property.

The questions presented by these records affect not only the plaintiff in error, Mrs. Caroline W. Dobbins, because of the large amounts involved, but they affect the interests of the entire community in which it is proposed, by her, to conduct the business of supplying a public utility. They affect also all other business enterprises of the State of California, for if these rights are no longer inviolable, but may be put in jeopardy at any time by the will of the municipal authorities, then property rights may be taken away, or their use perverted. It would be a most dangerous precedent, and one not to be tolerated by this Court, to hold that all property was subject to the mere will and fiat of the municipal authorities. Large enterprises would not be undertaken, without the security given and protection afforded by the inviolability of contracts and the constitutional guaranty that private property shall not be taken without due process of law.

Respectfully submitted,

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